

# INTRODUCTION TO THE STUDY OF LAW

A HANDBOOK FOR THE USE OF LAW  
STUDENTS IN EGYPT AND PALESTINE

BY  
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## PREFACE TO THE THIRD EDITION.

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THIS edition contains further additions to the text, and several additional footnotes and references. The large type text is intended to contain a consecutive exposition of the matter which the small type text and footnotes carry somewhat further for the benefit of the more philosophical or more instructed student.

I regret that the delay in the settlement of the future political and legal arrangements in Egypt makes it impossible for me to eliminate some statements which may have become obsolete even while this book is going through the press. The general character of the changes proposed is indicated in the text.

Continental writings upon legal theory are unduly neglected in English law schools, and it is my hope that this book, though primarily written for law students in Egypt, may perhaps induce some would-be English lawyers to read the works of such men as Charnont, Demogue, Géný, Saleilles, and Tarde.

Lack of time has prevented me doing much to adapt the text to the special needs of the new class of students now coming into existence through the establishment of law classes at Jerusalem under British auspices. The law in Palestine is not by any means so dominantly French in character as that of Egypt. The *Mejelle* is still applied, and new legislation follows English or Indian models. Thus the Palestine student will value less my

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numerous references to French and Egyptian cases and codes. In deference to his requirements I have introduced some references to and remarks upon Palestinian law. But in spite of its Egyptian character, I believe that this book is likely to prove more comprehensible to the English-speaking Palestinian than the standard English text-book written for students whose earlier course of studies has been so widely different.

I much regret that Sir Paul Vinogradoff's new work, *Outlines of Historical Jurisprudence*, has reached my hands too late for more than casual reference.

I have to thank Mr. N. W. Robson, the present lecturer upon this subject at the Sultanieh School of Law, for suggestions and assistance in the preparation of this edition.

FREDERIC M. GOADBY.

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## BOOKS OF REFERENCE.

The following books are referred to in the footnotes by the name of the author alone :—

Austin . . . . .	Lectures on Jurisprudence (4th ed., 1873).
Capitant . . . . .	{ Introduction à l'Etude du Droit Civil (3rd ed.).
Halton . . . . .	Egyptian Civil Codes (2 vols.).
Holland . . . . .	Elements of Jurisprudence (11th ed.).
Planiol . . . . .	Traité élémentaire de Droit Civil (6th ed.).
Salmond . . . . .	Jurisprudence (3rd ed.).

References are also given to the following, among other, books which are recommended to the student for further study :—

### 1. GENERAL JURISPRUDENCE.

Amos, Sheldon . . . . .	{ The Science of Law. Systematic View of the Science of Jurisprudence.
Brown, Jethro . . . . .	The Austinian Theory of Law.
Bryce, Viscount . . . . .	Studies in History and Jurisprudence.
Gray . . . . .	The Nature and Sources of the Law.
Ihering, R. von . . . . .	{ Der Zweck im Recht (Purpose in Legal Development). Der Kampf ums Recht (The Struggle for Law).
Kortunov . . . . .	{ Theory of Law (translated from the Russian, by W. G. Hastings, Boston, Mass., 1909).
Lightwood . . . . .	The Nature of Positive Law.
Markby, Sir William . . . . .	Elements of Law.
Miller . . . . .	The Data of Jurisprudence.
Pollock, Sir Frederick . . . . .	{ First Book of Jurisprudence. Essays in Jurisprudence and Ethics. Oxford Lectures. Notes to Maine's "Ancient Law."

- Vinogradoff, Sir Paul . { Common Sense in Law (Home University Library).  
 Outlines of Historical Jurisprudence.

## 2. HISTORY OF LAW.

- Esmein . . . { Cours élémentaire d'Histoire du Droit  
 Français (8th ed.).  
 Frazer, Sir James . Psyche's Task.  
 Holdsworth . . . History of English Law (3 vols.).  
 Jenks . . . Law and Politics in the Middle Ages.  
 . . . Short History of English Law.  
 Lee . . . Historical Jurisprudence.  
 . . . Ancient Law.  
 Maine, Sir H. S. . { Early History of Institutions.  
 Early Law and Custom.  
 Village Communities.  
 Pollock and Maitland . { History of English Law before the Time of  
 Edward I. (2 vols.).  
 Vinogradoff, Sir P. . Roman Law in Medieval Europe.  
 Viollet . . . Histoire du Droit Civil Français (3rd ed.).

## 3. MISCELLANEOUS.

- Arminjon . . . Etrangers dans l'Empire Ottoman.  
 Bagehot . . . Physics and Politics.  
 Carr . . . { General Principles of the Law of Cor-  
 porations.  
 Charmont . . . { La Renaissance du Droit Naturel.  
 Les Transformations du Droit Civil.  
 Le Code Civil (1804-1904). } Livre du Centenaire.  
 Demogue . . . Les Notions Fondamentales du Droit Privé.  
 Dicey . . . { Law of the Constitution (7th ed.).  
 Law and Opinion in England (1st ed.).  
 Duguit . . . L'Etat.  
 Gény . . . { Méthode d'Interprétation et Sources en  
 Droit Privé Positif (1st ed.).  
 Green, J. R. . . { Lectures on the Principles of Political  
 Obligations.  
 Grigsby . . . { The Mejele or Ottoman Civil Law (trans-  
 -lated into English).  
 Maitland . . . Equity; also the Forms of Action.

Mallieux . . .	•	L'Exégèse des Codes.
Melville . . .	.	Manual of Roman Law (1915).
Pélissier du Rausas . . .	.	Le régime des Capitulations (2nd ed.).
Saleilles . . .	.	De la Personnalité Juridique.
Scott . . .	.	Law affecting Foreigners in Egypt.
Sidarouss (Sesostris Bey)	.	Les Patriarchats.
Spencer, Herbert . . .	.	Justice (Pt. IV. of the Principles of Ethics).
Tarde . . .	.	Les Transformations du Droit.
Walton . . .	•	Scope and Interpretation of the Civil Code of Lower Canada (Montreal, 1907).
	•	Introduction to Roman Law (2nd ed.).
	•	Egyptian Law of Obligations (1920).
Halsbury, Earl of . . .	.	The Laws of England.
Kadry Pasha . . .	•	Statut Réel (Mussulman).
	•	Statut Personnel (Mussulman).
Wilson . . .	.	Digest of Anglo-Mohammedan Law.
Young . . .	.	Corps du Droit Ottoman.

The following abbreviated methods of reference are employed:—

#### EGYPTIAN CODES, ETC.

D. R. (Native) . . .	•	•	Decree for Reorganization of the Native Courts.
S. O. Mixed . . .	.	•	Statute of Judicial Organization for Mixed Suits.
N. C. C. . . .	.	.	Native Civil Code.
M. C. C. . . .	.	.	Mixed Civil Code.
N. Com. C. . . .	.	.	Native Commercial Code.
M. Com. C. . . .	.	.	Mixed Commercial Code.
N. C. C. Pro. . . .	.	•	Native Code of Civil and Commercial Pro- cedure.
M. C. C. Pro. . . .	•	•	Mixed Code of Civil and Commercial Pro- cedure.
N. P. C. . . .	.	•	Native Penal Code.
N. C. Cr. Pro. . . .	.	.	Native Code of Criminal Procedure.
M. C. Cr. Pro. . . .	.	.	Mixed Code of Criminal Procedure.

#### FRENCH CODES.

F. C. C. . . .	•	.	French Civil Code.
F. Com. C. . . .	.	.	French Commercial Code.
F. P. C. . . .	.	.	French Penal Code.
F. C. Cr. Pro. . . .	.	•	French Code of Criminal Procedure (In- struction Criminelle).

## PERIODICALS.

- L. Q. R. . . . . Law Quarterly Review.  
 Jour. Soc. Comp. Leg. { Journal of the Society of Comparative  
                                   Legislation.  
 Rev. Trim. . . . . Revue Trimestrielle de Droit Civil.

The German Civil Code is referred to as B. G. B. (Bürgerliches Gesetz Buch).

Egyptian laws and decrees are referred to as Law or Decree with the date in English.

French laws and decrees are referred to as Loi or Décret with the date in French.

English statutes are referred to in the usual manner by the regnal year or the short title.



# INTRODUCTION TO THE STUDY OF LAW

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## . INTRODUCTION.

### § 1. THE STUDY OF THE LAW.

THERE are several different ways by which we may approach the study of the law.

Most trades and businesses are learned by actual practice therein. The would-be craftsman starts by trying his prentice hand on some simple object of his craft under the guidance of his master. Gradually he acquires skill, until at last he is able to undertake alone the work of his craft.

At many periods of legal history this has been the method adopted for instructing law students in their profession. And the method is not without its advantages. For law is practical. Its value depends entirely upon its practical effects. In order to understand the law it is necessary to be acquainted with its working and to gain skill in applying it. The lawyer is always dealing with facts, and it may be argued that the sooner the young student comes in contact with facts and tries to fit his law to the facts, the sooner is he likely to gain an understanding of his profession.

But although law is definitely practical in aim, yet it is more than a body of mere rules of thumb which can be learnt by practice.

Every part of the law is permeated by general ideas of which each particular case is but an application. An

accomplished lawyer must consider each set of facts which arises in the light of the general rules of law, and for the proper understanding of these general rules much thought is necessary. The broad principles of law cannot be adequately understood unless time is devoted to their study independently of practice.

Again, although law is so practical a study, yet its practical aspect does not include all the interest which it has for men. And if the lawyer wishes to rise to the full measure of his functions in society, he must be acquainted with these other aspects of his profession.

The complete study of the law demands in the first place some acquaintance with legal history. Law is not the creation of a day. It has grown up among the people. The law of to-day can therefore be understood only through a study of the law of the past. Moreover, the history of law does more than assist the lawyer to understand the rules with which he is concerned. It is part of the general history of society. Law has adapted itself to the needs of the people as they change from generation to generation so that its history reveals the changes which have taken place in social relations and social ideals.

In the second place the study of the law involves a discussion of problems common to other sciences of human conduct. Law is but a regulation of human conduct for the purpose of securing certain ends. The scientific study of law is therefore related to all other sciences which concern conduct; to Psychology, which analyses the development and working of the human mind; to Ethics, which enquires into the proper ends or aims of conduct; to Economics, which studies men in their business relations intent upon the acquisition of material wealth; and to Politics, which concerns itself with the conduct of men as members of political societies or states. Problems proper to each of these sciences enter into the complete study of the law. Between

each of them lies a debateable land in which the problems of each can only be properly studied in the light of considerations drawn from the others.

Each of these sciences throws light upon the purposes for which law exists and the methods by which its aims can best be secured. The study of these aims leads further to an enquiry into the way in which different countries have sought to secure them. Comparative Law will provide the materials necessary for this enquiry, for the science of Comparative Law collects, arranges, and compares the variety of rules existing at different epochs and in different places. The consideration of existing bodies of law with reference to their ends gives rise to criticism of their contents by reference to standards of natural justice and human convenience. Some writers have even gone so far as to seek to construct ideal systems of law so fashioned as to attain the ends which in their view law should promote. But although the lawyer may well be reluctant to indulge in such airy visions, his knowledge should at any rate enable him to be a competent critic of existing rules. It is for him to point out where the law needs improvement and to suggest schemes for remedying the defects. The progress of society makes continual change necessary in the rules which regulate social conduct. A system of law adequate for the needs of a people emerging from barbarism, for example, will obviously be unfit for one which has attained civilization. The accomplished lawyer must be ready to devote his knowledge to the adaptation of the old law to the new needs.

Thus the complete lawyer must be not only a skilled practitioner, well versed also in the principles of his own legal system, but a student of history, a philosopher of no common range of knowledge, and a legal critic. Few can hope to reach so lofty a professional standard. But at any rate these broader aspects of the profession cannot be approached merely by the avenue of practice. Study and

instruction independent of practice are requisite, and this it is the object of a Law School to supply. It is to it we must look to impart a knowledge and real understanding of the principles governing each department of the law. And it is during his student days that the young lawyer is brought into contact with the historical, philosophical, and critical aspects of his profession as contrasted with the purely practical skill only to be acquired in the everyday round of business life (*a*).

This book is intended to serve as a guide to the novice commencing legal study and to introduce him to some of the questions which have engaged the attention of legal historians and philosophers in Europe. Broadly speaking, its scope corresponds to what is known in England as the science of "Jurisprudence."

## § 2. THE NATURE OF JURISPRUDENCE.

The word "jurisprudence" is derived from two Latin words meaning "knowledge of law," and we might expect, therefore, that to study jurisprudence was equivalent to learning the law. This is not so. It is true that the word is not unfrequently used as a substitute for the word "law." Thus we speak of "Medical Jurisprudence," meaning "the law concerning matters which enter into medical practice." But it has perhaps somewhat oddly been also given in English a very limited meaning, and is employed to signify not the study of the law itself nor that of any special part of the law but the study of the general ideas which underlie all bodies of law (*b*).

(*a*) See "The Purpose and Method of a Law School," by Dr. Jethro Brown, L. Q. R. (1902), pp. 78, 192, and particularly pp. 192-205. "Legal Education, Academic and Professional," by Prof. Kenny, L. Q. R. (1913), pp. 406 ff. Amos, "Systematic View," Chap. III.

(*b*) Various definitions of the scope of jurisprudence have been attempted by English writers, but they are generally couched in such abstract language as to be beyond the comprehension of a novice.

These general ideas group themselves around a discussion of two main topics, the nature of law, and the nature of the principal legal relations. Thus Jurisprudence aims firstly at an analysis of the idea of law. It seeks to ascertain the elements which make up this idea, both as it is presently conceived and as it has been viewed in the past. The fundamental fact which is at once brought out by a consideration of the nature of law is that its purpose is the regulation of human conduct; or, in other words, of the relations of men with one another. The determination of the nature of law leads, therefore, to a determination of the nature of the legal (or jural) relation. Legal relations are of different kinds, and the second problem with which Jurisprudence deals is the analysis of the nature of those different kinds of relations recognized or created by law. Many of the principal relations of this kind have names by which they are well known in popular language. Such are Ownership, Marriage, Contract, and the like. The ultimate aim of Jurisprudence is the explanation of the differences existing between these and between other legal relations so that their essential features may become plain.

The student of Jurisprudence seeks, therefore, to discover and expound the logical framework upon which rest the principal modern systems of law. His study is a science because it is concerned with classification. Classification involves a study of function. The nature of the jural idea can only be understood by reference to the purposes it serves. What, we may ask, is the nature of Possession? The only possible answer will be one which expounds the conditions under which Possession is protected in various systems of law, and the fixing

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The most precise is that of Dr. Holland, who in his book on the subject, speaks of jurisprudence as "the formal science of those relations of mankind which are generally recognized as having legal consequences" (Holland, p. 9, and see the whole of his first chapter for a discussion of the nature of the science. See also Salmond, Chap. I. Amos, "Systematic View," Chap. I. Gray, "The Nature and Sources of Law," §§ 311 ff. Vinogradoff, "Common Sense in Law," pp. 9 ff.).

of their conditions must have always depended upon the purposes which the protection of Possession was intended to secure.

Obviously the study of Possession, or of any other jurial relation, is only possible by reference to past or present systems of law. And it is natural for each student to start with his own system, and in any case to confine his attention to such systems as are sufficiently like his own to make comparison fruitful. The Civil (Roman) Law, ancient and modern, the Common (English and American) Law will provide most of the material for the European student. Both these systems are at a similar stage of development, and both are the practical law of peoples whose civilization is identical in general character.

It is not easy or necessary to draw a hard and fast line between Jurisprudence, Comparative Law, and Legal History. The objects of each of these branches of legal study differ, but the material with which they work is often the same. The scientific legal student seeks to expound the nature of the principal legal relations as conceived in developed systems of law. The Comparative lawyer tries to exhibit the differences and similarities in the methods by which law has been adapted to meet human needs. The historian is concerned with the development of the law of the present from the law of the past. These studies overlap. Indeed some writers distinguish between Analytical Jurisprudence, Comparative Jurisprudence, and Historical Jurisprudence, and their treatment of the latter branches is really nothing but a part of Comparative Law and Legal History. But although there is overlapping there still remain three branches of study. Just so the Science of Politics involves reference to various systems of polity and to the development of existing political institutions. Yet the Science of Politics is not part of Political History, nor is the comparative presentation of systems of polity, Political Science.

Dr. Holland has instituted a comparison between the relation of Jurisprudence to law and that of Grammar to language (c). Languages differ much from one another in vocabulary, accidents and syntax, but these differences are differences of form rather than of purpose. For the ideas and the feelings of men are fundamentally the same among all races, and consequently language, which is their expression, must reveal the resemblance. Thus the ideas of past, present, and future, of subject and object, of degrees of comparison, of qualifying adjective and adverb, must find expression in all language. In the same way the relations in which men stand to one another, as father and son, husband and wife, buyer and seller, injurer and injured, are

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(c) Holland, *loc. cit.* ; And see Pollock, "Essays in Jurisprudence and Ethics," pp. 3-6.

common to all societies, and we may expect to find them regulated by all systems of law.

Now the study of the relations which are expressed in language might be made the subject of a special science. A grammarian might explain the nature of a genitive case and illustrate his explanation by examples drawn from different languages of the ways in which the relation intended is brought out. The genitive is expressed by different forms in Arabic, in English, and in Latin for example, but the relation expressed is, in all cases, the same. The collection and comparison of these different possessive forms falls within the scope of the science of Comparative Grammar, and the exposition of the nature of the relation which they seek to express might form part of a science of Abstract Grammar. In the same way Comparative Law collects and compares the variety of legal rules which have been established to govern the conduct of men in their relations with one another, and Abstract Law or Jurisprudence examines the nature of the relation which the rules have been established to govern (*d*).

Jurisprudence is not an easy science. It cannot be learnt by getting up rules and becoming familiar with the articles of a Code. It is concerned with abstract ideas, not with concrete provisions, with the meaning of law and legal relation, not with the rules of English, French, or Egyptian law. This makes it in some respects an inappropriate subject for the attention of the novice in law. Indeed the tendency in English Universities is to postpone its study to the end of the student's course, it being very reasonably thought that a man will be better able to understand the abstract ideas after having become familiar with the concrete rules of his own system. But although there are undoubtedly objections to the discussion of the nature of legal ideas before the student has come into contact with the ideas themselves as they are worked out in practice, yet on the other hand there are advantages in making a study of the easier parts of the science of Jurisprudence preliminary to the study of the body of existing law. In the first place the introductory study of general legal ideas facilitates the

(*d*) For a criticism of this analogy, see Gray, *loc. cit.*

mastery by the student of the rules of his own system, for he comes to it prepared by a comprehension of certain principles which underlie it. Then again the presentation to the student at the commencement of his course of the fundamental ideas common to all legal systems induces in him respect for general principle and prevents him from treating law as something fortuitous and accidental. And, moreover, the preliminary study of elementary legal ideas gives opportunity for some discussion of the wider interests of law and its manifold points of contact with other sciences of human conduct. When the student's attention is engaged with the details of his own system it is more difficult to excite interest in these less directly useful subjects.

The present work is an attempt to place before the Egyptian student the outlines of the science of Jurisprudence presented with special reference to the legal system of Egypt. It is called an Introduction to the Study of the Law because it does not profess to be confined to the topics which fall within the scope of Jurisprudence strictly so called. Something is included which correctly belongs to the history of the law, and much also which is of special interest in Egypt and which it is useful for the Egyptian student to know as preliminary to his study of law. Yet, in its main features, it is a treatise on Jurisprudence, and frequent reference will be made to the recognized English treatises on this subject. Following the division already suggested, the book is divided into two parts. The first is entitled "Law," and under that head are discussed the subjects which group themselves round the problem of the nature of law. The first chapter deals with this problem; the second continues the subject, dealing in particular with the relations of Law to Morality. In the next three chapters the Sources of Law are discussed, the fifth chapter being devoted specially to the subject of Interpretation. The sixth chapter explains the principal classifications of law, and the seventh



discusses the principles upon which law is applied to men, a subject certain parts of which are of special interest in Egypt and Palestine.

The second part is concerned with the nature of Legal Relations and is entitled "Legal Rights and Duties." The elements of the legal relation are analysed and the principal legal relations classified and their nature explained with special reference to the French law in force in Egypt.

As preliminary to the discussion of these problems it will be well for the student to become familiar with the names and distribution of the principal legal systems to which reference will from time to time be made. Three systems alone call for special attention—the Roman Law and the allied systems of modern law founded mainly upon it, the most important of which from an Egyptian point of view is the law of France; the Mohammedan Law; and the English Law.

### § 3. THE DISTRIBUTION OF THE PRINCIPAL LEGAL SYSTEMS.

#### 1. *Roman Law.*

Roman Law had its origin in the customs and institutions of the people of Rome, and its history as a legal system commences with the promulgation of the XII. Tables in B.C. 450. At first the Roman Law was the law of the citizens of Rome only. The gradual extension of the power of that city made its people the masters of many nations. The Romans did not abolish the national laws of the people whom they conquered, but the privilege of Roman citizenship was often given to members of the vanquished races, and thus the sphere of the Roman Law was widened. But the Roman Law itself underwent a great change as a consequence of the contact of the Romans with foreign people. New elements were introduced into it from outside, and,

under the guidance of the magistrates who administered it and the jurists who expounded it, it became fitted for the regulation of the interests of the many diverse races included in the Empire. And the ultimate extension of Roman citizenship to all subjects made the sphere of the Roman Law coterminous with the boundaries of the Roman power. Thus a system of law which had originally been that of an obscure city became, in its modified form, the law of the civilized world.

The invasion of the barbarian tribes which commenced early in the fifth century weakened and finally destroyed the Roman power in Western Europe. The centre of gravity of the Empire was shifted to Byzantium. This town had been erected into a second capital of the Empire by the Emperor Constantine at the beginning of the fourth century and rechristened by him New Rome. Later it came to be known as Constantinople, *i.e.* the City of Constantine. It was the seat of the Eastern half of the Empire. Though Roman in name and Roman in law, this Eastern Empire gradually became Greek in language and in character. Within its boundaries lay at one time or another the countries now known as Serbia, Bulgaria, Roumania, Albania, Greece, Asia Minor, Mesopotamia, Syria, Egypt, Tripoli, Tunis, Algeria, and Morocco. The Byzantine Emperor Justinian, who reigned at Constantinople in the first half of the sixth century, undertook the collection and simplification of the authorities upon which the law was based, and the result of his work was the Roman Digest which is to-day the principal source of our knowledge of Roman Law. It forms a body of law consisting of extracts from the writings of the great Roman jurists, arranged in books, each dealing with a particular subject. In addition to the Digest, Justinian caused to be compiled an elementary work on the Roman Law known as the Institutes, founded upon an earlier book of the same character written by the jurist Gaius in the third century. The

Institutes of Justinian and of Gaius remain to this day the basis of elementary instruction in Roman Law. To the Digest and Institutes was added a book containing a collection of Imperial Decrees, and these three works together with the later decrees known as the Novels form the Roman Corpus Juris.

Justinian was not only a great lawgiver but a great conqueror. Perhaps it would be more correct to say that his ambition had the good fortune to be served by able generals. He reconquered Northern Africa and Italy from the barbarian Vandals and Goths who had wrested these lands from the Western Empire. His conquest was, indeed, in each case only temporary, and in the case of Africa it had no lasting results, but in the case of Italy this partial reconquest led to the use of Justinian's Digest there, and in spite of all that happened afterwards in that much-troubled country the knowledge of that great treasure house of Roman Law never quite died out and was to revive some centuries later with important results for the European nations.

The Eastern Empire continued to exist until its final overthrow by the Turks, who in 1453 captured Constantinople. Long before that date, however, its boundaries had been much reduced, principally by Arab and Turkish conquests. It is unnecessary to examine here how far the compilations of Justinian remained the basis of the law administered within the Empire till its final fall. It is sufficient to note that it became gradually overlaid with later legislation and much changed under the Greek influences which were dominant in the East. This later Græco-Roman Law was swept away after the Ottoman conquest save so far as the Sultans permitted it to remain as the law of the Greeks who then became subjects of the Turks (e).

(e) As to the fate of Roman Law in the East see Sheldon Amos, "Roman Civil Law," pp. 392 ff. Walton, "Introduction to Roman Law," Chap. XXXII.

The fate of Roman Law in the West has been very different. The Arabs and Turks who conquered the Eastern Empire brought with them a new religion and a new system of law, the religion and law of Islam. But the barbarian tribes who overran the Western Empire were mostly pagans and they lived under tribal customs of a primitive character. Their numbers, moreover, seem frequently to have been small in comparison with those of the existing inhabitants of the conquered territory. The invasion destroyed the authority of the Roman State, but the invaders became to a considerable extent assimilated to the people they had conquered. The conversion of the invading tribes to Christianity was largely instrumental in this assimilation, which manifested itself in a gradual adoption by them of the language and law of the older residents.

Thus the Roman Law continued to be applied in the West, although to a greater or less degree it had to contest for authority with the customs of the barbarians themselves. In one country only which had formed part of the Roman Empire was the Roman Law entirely uprooted. This was England. The consequence of this fact is the radical difference existing to this day between English Law and the law of the other countries of Western Europe.

The barbarian invasion took place before the compilation of Justinian's Digest, which consequently was not at first the source from which knowledge of the Roman Law was derived. The barbarian kings early attempted Digests of their own, of which the most important is the *Lex Romana Visigothorum*, generally known as the "*Breviary of Alaric*," compiled by Alaric II., King of the Visigoths (484—507). The Visigothic kingdom lay in South-Western France and in Spain. The rule of the Visigoths in France was, however, brought to an end soon after the promulgation of the *Breviary*, which nevertheless remained for many centuries the most authoritative expression of the Roman Law in the

country. The Franks who conquered Northern France preserved more completely their national customs than did the invaders of the southern part of the country, and this led to a division of France for legal purposes into *pays de droit écrit*, namely, the southern part of the country, in which the written Roman Law was dominant, and *pays de coutume*, consisting of the northern provinces, which observed for the most part law based on Frankish customs. In course of time, however, the customary law of the north became more and more penetrated by Roman ideas (*f*), but the law of France was not unified as a whole until the publication of the Codes at the beginning of the nineteenth century. This great work of codification of the law was completed during the period of Napoleon's power. The principal landmark was the publication of the French Civil Code in 1804. The special history of the codification of the French Law will be narrated later, but it is necessary to note here that the history of what is called modern Roman Law is particularly identified with the Codes of France, which have had an incalculable influence upon its development in Europe and elsewhere during the past century. This modern Roman Law is founded upon the Roman Law of Justinian's Digest and to a less extent upon the customary law of the Middle Ages. In its present form it represents an adaptation of the principles derived from these sources to the needs of modern life, under the continual stress of changing social conditions.

It is not only in France, however, that Roman Law has moulded the legal institutions of the country. Italy even more strongly than France retained deep traces of the Roman dominion. As has been already remarked, this country had been reconquered and united with the Eastern Empire in the time of Justinian, and his Digest and Code were then

(*f*) See Vinogradoff, "Roman Law in Mediæval Europe," Lect. III., for examples of the methods of this reception.

introduced. Although shortly afterwards another barbarian tribe, the Lombards, overran it, and finally established themselves, the knowledge of these great sources of Roman Law was never lost, and they formed the subject of earnest study in the Italian Universities in the Middle Ages. Particularly famous in this connection are the labours of the professors of the University of Bologna, whose interpretations and annotations of Justinian's Digest were of peculiar importance. These men were the leaders in the revival of the study of Roman Law in the eleventh and twelfth centuries and form a school of jurists known as the Glossators from the "glosses" which they made upon the text of the Digest.

Roman Law formed the basis of the Law of the Italian States, and the modern Italian law has inherited this tradition. In very recent times indeed a strong influence has been exercised upon it by the French law which in the form of the newly compiled French Code was introduced into the country by Napoleon. Napoleon's fall resulted in a return to former political conditions and the revival in most cases of the older law; but future legislation in the Italian States followed French lines. The equity and symmetry of the Code Napoleon could not but be a mighty inspiration in a country of which the law at the time was so confused and unfitted for modern needs. In the new national Italian Code of 1865 this French influence is manifest.

Spain also derives her law principally from Roman sources, with a certain admixture of customary law surviving from the days of the old Visigothic kingdom. For although Roman Law was never formally received as authoritative in Spain, yet its principles were followed very largely by Spanish jurists and Spanish Courts and thus moulded the law of the country (*g*).

The races of Latin Europe have therefore preserved the

(*g*) Lee, "Historical Jurisprudence," pp. 431-434.

Roman Law in practical use. But its influence has been also felt in the law of the Teutonic peoples. The close connection of Belgium with France has indeed resulted in the adoption by that country of the French Code as the basis of her law. In Holland, a modified species of Roman Law was evolved out of Roman and Dutch elements, and this is known to-day as Roman-Dutch Law. French legal influence has more recently resulted in a closer assimilation of Dutch with French law (*h*).

In Germany special circumstances brought about during the Middle Ages what is known as a "reception" of Roman Law. In mediæval times Germany was rather a geographical expression than a state, the only bond of union between the petty states of which it was composed being found in their common inclusion in the Holy Roman Empire (*i*). The law of each of these states was derived from Teutonic custom,

(*h*) See more fully as to Roman Law in the West, Walton, "Introduction to Roman Law," Chaps. XXIX.-XXXI. Melville, "Manual of Roman Law," pp. 46 ff.

(*i*) The Holy Roman Empire must not be confused with the ancient Roman Empire, of which nevertheless it professed to be the successor. It originated in the conquests of the Frank King Charles the Great, who was crowned Emperor of the Romans by the Pope Leo III. in the year 800. At that time the Empire comprised all Western Christendom and united Catholic Christianity under one temporal head, the Emperor, and one spiritual head, the Pope. It is permissible to compare with it the Mohammedan Empire in the early centuries after the Hijra, for at that time Islam was united under one head, the Caliph, who was both temporal and spiritual ruler.

The Empire of Charles the Great broke up after his death, but was revived in a more restricted form in the tenth century by the German Otto and his successors. For several centuries the Emperor wielded a more or less genuine power over the territories now covered by Germany, Austria, and Italy, but the growth of feudal states limited his authority, which finally degenerated into a shadowy lordship over the rulers of really independent kingdoms. After undergoing strange vicissitudes the Empire was finally extinguished by Napoleon in 1806. Its history will be found in Viscount Bryce's well-known book "The Holy Roman Empire."

but the customs were not uniform, and consequently there existed no single body of law enforced throughout the whole of Germany. The growth of intercourse made such a body of law necessary, and this fact prepared the way for the adoption of Roman Law as the common law of the country (*k*). This reception of Roman Law did not, however, take place by the publication of Codes based upon it, but through a steadily increasing application of Roman rules by jurists and by judges engaged in the administration of the law. This process, which commenced in the fifteenth century, has resulted in a romanization of German law, although it has by no means completely destroyed the influence of the customary law. The law in Germany as now expressed in the new German Code of 1896 contains, therefore, both Roman and Teutonic elements.

In Scotland also Roman Law has through the medium of France and of Holland much influenced the form and contents of the law. Scots law still shows distinct traces of Roman influence from these sources, though a gradual assimilation to English law is taking place (*l*).

In Eastern Europe the study of Roman Law in Christian countries has revived with the removal of the Ottoman power. In Roumania a Code strongly marked by French influence has been adopted, and in Greece the legislation has also followed French and Italian models.

Nor is it in Europe alone that these modernized forms of Roman Law are to be found. European emigrants have generally taken their law with them when settling in a new country. Thus the French settlers in Lower Canada used the law of their mother country, and this law remains in force although the colony has passed into other hands. To this day consequently the law of the Canadian Province of Quebec is French in character, though like the rest of Canada the

(*k*) Vinogradoff, *op. cit.*, Lect. V. • Lee, *op. cit.*, pp. 389-405.

(*l*) Lee, *op. cit.*, pp. 421-440.



countries, and Greece, and were only finally checked at the close of the seventeenth century before the gates of Vienna.

By these conquests many Christian countries passed into Mohammedan hands. In those which were conquered during the first century A.H. the bulk of the inhabitants were either exterminated or ultimately accepted the religion, and the religious law became in consequence applicable to them *in toto*. In Syria and Egypt, and still more in the Sudan, the process of islamization was slow, but gradually it was accomplished, and thus these countries became predominantly Mohammedan. Yet there has always been in Egypt, Syria, and Mesopotamia a remnant of adherents of the older faith. In India, in spite of the large number of conversions, the vast majority of the people remained untouched, so that at the present day in India Moslems, though numerous, form a relatively small part of the population. In Greece and the states in the Balkan Peninsula the Mohammedan faith made comparatively small progress among the native inhabitants. And during the last hundred years the Balkan peoples and the Greeks have established national states independent of Turkey. Law and religion in Islam are so closely connected that the territorial extension of the faith is in effect identical with that of the law. Where the faith failed to preserve its hold, as for example in Spain and Sicily, the law vanished with it, and each extension of the religion involved a corresponding extension in the application of the law. For adherence to the religion involves obedience to the law.

This striking difference between Mohammedan Law and the law of Christian countries will be dealt with more fully at a later stage. It will then be necessary to consider the limits of the application of the Sacred Law in countries inhabited partly or mainly by Moslems, but ruled by non-Mussulman rulers. It is sufficient here to note that even in strictly Mohammedan countries the application of the law is often much restricted. But this restriction is the

consequence of a modern reaction of the West upon the East. In seeking to adapt law and state organization to European standards the more progressive Mohammedan countries have introduced bodies of European law which are applied in substitution for parts of the Sharia. This is the case both in Turkey and Egypt.

### 3. *English Law.*

Unlike the Roman-French Law and the Mohammedan Law, the English Law has no application in Egypt and has only exercised an occasional influence upon the law of the country. It ranks, however, with modern Roman Law as a widely-distributed system among peoples of European origin or under European influence.

English Law, though in some of its developments influenced by Roman ideas (*q*), is as a whole original in character. Its titular origin is to be found in the customs of the Saxon and Norman invaders of England, but the vital source of its rules is the practice of the English Courts in which its principles have been worked out and adapted to the needs of English social and business life. This development has been effected in comparative independence of Continental influence, and this fact makes comparison between the law of England and the modern Roman Law of peculiar interest.

English Law is applied in Wales and in Ireland. The American colonists took it with them to the New World, and as a consequence it forms the basis of the law of most of the states of the American Union, the principal exception being the State of Louisiana. Within the British Empire the law of all the self-governing colonies of purely British origin is English in character. This is the case with Canada (except

(*q*) For the influence of Roman Law in England, see Vinogradoff, *op. cit.*, Lect. IV., and a series of articles upon the subject by Mr. Holdsworth in L. Q. R. (1912), pp. 39, 131, 236.

the Province of Quebec), Australia, New Zealand, and the West Indies. Moreover, parts of the English Law in a modified form have been introduced into India by the British rulers of that country, the Indian Codes following English Law much in the same way as those of Egypt follow the Codes of France. From India this law has been introduced into other countries under British rule or influence—for example the Sudan.

The British Empire in its wide extent and great diversity includes, therefore, countries which follow each of the great systems of law above discussed. Before the Supreme Court of Appeal for the Empire, the Judicial Committee of the Privy Council, may come for decision questions of English Law from Canada or Australia, questions of Roman-French Law from Quebec or Mauritius and of Roman-Dutch Law from South Africa or Ceylon, and questions of Mohammedan Law from British India or Cyprus (r).

(r) See Sir F. Pollock, "The Jurisdiction of the Privy Council" in *Jour. Soc. Comp. Leg.* N. S. XVI.

# BOOK I.

## LAW.

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### CHAPTER I.

#### THE NATURE OF LAW.

At the threshold of our legal study we are confronted by a problem which has long provoked discussion and which has never received a solution universally accepted. "We need to understand the nature of law."

The word "law" is used in several different senses, though they are all related one to another. It will be our duty to distinguish these various significations, ascertaining what common element connects them with each other and what special features mark off that species of law which lies within the province of the lawyer's study. The English word "law" corresponds to the French word "Droit." Thus "English law" and "Droit anglais" are exact equivalents. The corresponding word in Latin is "Jus," and in German "Recht." These French and Latin words have also another signification not conveyed by the word "law" which often causes confusion (a).

In Egypt as in other Mohammedan countries there exists a body of law which is to the Mohammedan the law *par excellence*, to wit, the Sharia or Sacred Law, revealed from on high through the medium of the Prophet. Fundamental differences exist between this conception of law and that

(a) See below, pp. 73 ff.

prevalent in European countries. The dominant character of the Sacred Law has led to this word "Sharia," which would strictly include all kinds of law used among men, being generally restricted in its meaning to the Sacred Law alone. If the wider use were still possible the word would correspond to the abstract sense of the English "law" and French "droit" explained above.

From the "Sharia" has to be distinguished the "Qanun," which appears to correspond rather to the English word "legislation" than to "law." It is used more strictly of decrees made directly by the supreme authority in the state. Consequently the word describes only a species of law. Yet the need being felt of some word to denote bodies of law other than the Sharia, this word "Qanun" is often used for the purpose (b).

The various significations of the word "law" are connected together by the fact that all connote certain common ideas, but they are differentiated one from another because when used in certain connections the term connotes only one or more of these ideas, which are, therefore, alone common to the other significations.

In all its meanings the term "law" connotes the idea of "Order" or "Uniformity." Used more strictly it also connotes the idea of "Authority." To this idea is generally annexed that of "Compulsion" or "Enforcement." In a still stricter sense law involves the assumption that the compulsion is applied by the state. To these ideas involved in law some writers add that of "Justice." The connection of this last idea with that of law will, however, be discussed in the next chapter.

The commonest popular association of law is that which connects it with Order. Indeed these two terms are so closely connected as frequently to be coupled together in

(b) The word "Qanun" is not Arabic. It is only an arabicized form of the Greek *κανών* (canon)—a rule.

speaking. "To be on the side of law and order," "the maintenance of law and order," are commonplaces of everyday speech.

This close association suggests the first essential element in the idea of Law. Law regulates action. It determines what shall be done and what shall not be done, and so far as it succeeds in accomplishing this regulating purpose it produces a certain uniformity of action on the part of those subjected to it. Thus uniformity or order is essential to the conception of law, and is present in every signification in which the word is used.

★ Now, as the administration of law produces order, so it is not unnatural that men should infer the existence of law wherever they observe the existence of order. The ordered universe which we are learning to see around us suggests the existence of law which has established it. (The order is referred to law.) Thus the word "law" is used in a figurative sense to express those uniformities which have been observed to run through external nature. Scientists speak of the Law of Gravity, Boyle's Law, the Laws of Chemical Action, and describe all these as Laws of Nature. The close connection which exists between law and order thus leads men to describe an observed order as if it were the result of law (c). In speaking of the Law of Gravity we do not mean to imply that bodies in attracting one another are obeying a rule which has been laid down for their obedience. All that is meant is that bodies do attract one another as if (using a figure of speech) they were obeying a law. Common as is this use of the word "law" to express the order of nature, it is strictly speaking incorrect. It is only a figurative use of the term prompted by the association of law with order. ★

(c) The term "law" now applies primarily to rules of human conduct. But this was possibly not the case with the corresponding terms in early times. See Maine, "Early History of Institutions," pp. 373 ff.

That the "laws" of nature can only be metaphorically described as laws should be carefully borne in mind. Forgetting this, careless persons sometimes argue that a "miracle" is a special intervention on the part of the Supreme Lawgiver, God, who on this occasion has dispensed with the observance of his laws, just as an autocrat may dispense in a special case with the observance of the laws of his realm. This is a misuse of a figure of speech. The "laws" of nature are merely statements of fact; the fact of an observed uniformity. The occurrence of a so-called miracle, properly authenticated, could only lead the scientist to conclude that he had not yet fully understood the character of the uniformity, and would put him on enquiry to find some more general statements under which the "miracle" could be brought, otherwise he would be driven to believe that the universe was not an ordered universe—not a Cosmos but a Chaos. But all scientific enquiry starts with the assumption that this is not so. If it were, scientific enquiry would be useless.

✓ The law with which lawyers are concerned aims indeed at securing order, but it is an order or uniformity in the conduct of men which it seeks to secure. Laws are rules of conduct laid down for the purpose of directing men's actions. The Laws of Nature are neither obeyed nor disobeyed. Obedience implies the possibility of disobedience, and neither one nor the other is possible in the case of natural laws, for these are but statements of an observed uniformity in the universe. But in the case of rules laid down for the government of men's conduct, though obedience may be usual, disobedience is possible. The order produced by them is due to the conscious obedience rendered by men to their precepts. Why such obedience is given we shall have to enquire later. At present it is sufficient to note the immense difference which separates a law of nature from law as a rule of human conduct. The first class of so-called laws only state in a general form the existence of an order which exists among natural phenomena. How that order is produced we do not know. Rules of conduct, on the other hand, are set for the observance of man. They are intended to produce order in the conduct of men. But compliance with them on

the part of men is necessary if such order is to be produced. In all groups of men acting together for any purpose some rules must be established for the guidance of the conduct of the members. Unless the scope and limits of the actions of the various members of the group be determined by rules, the ends which the group seeks could not be secured. ✓

This is true, not only when men are acting together temporarily for some special purpose, but also when they are living permanently in society with each other. For, in the first place, social life would dissolve in anarchy unless men were prepared to follow recognized rules in their relations with each other. Each individual must be willing to surrender some part of his own liberty of action if the society is to hold together. Absolute licence of action on the part of all would in fact defeat itself. Much greater freedom is really secured for the individual by a common respect for established limits of action. } Licence, for example, would permit A. to strike B. or C., but it would also render him liable to attacks from them. The ordered freedom of social life forbids A. to strike B. or C., but it also frees him from apprehension of attack from them. ✓

In the second place, obedience by men to social rules enables all the members of the society to co-operate for common ends. Co-operation is impossible without a sacrifice of liberty on the part of all who join in action. The simplest example of co-operative action is furnished by war, defensive or offensive. No war could be carried on successfully unless the members of the society were willing to subject their own liberty of action to the attainment of the ends sought by the society.

Society, therefore, can only exist and prosper on condition that the members are prepared to obey rules. ✓ Yet the society of his fellows is essential to man. Philosophers have sometimes speculated as to what a man might learn and what sort of a being he would become if he were left



entirely to himself from his earliest years (*d*). Such speculations are merely philosophic fantasies. Society is essential to man and is a condition of all human knowledge and progress. Thus the existence of rules which alone make social life possible is based upon what may be termed the sentiment of "social solidarity," that is to say, upon the sense of mutual indispensability existing between men and their fellows. We are all necessary one to another, for, in the absence of others, we should ourselves find our development arrested. Using philosophical language, we may say that man finds in social co-operation alone the means for his own personal realization (*e*).

It must, however, be admitted that many rules established among men do not owe their origin to the prompting of social necessity, and that, even in cases where some rule is necessary, the rule actually followed is due to what may almost be described as mere accident.

In searching for the origin of social rules it is not, therefore, sufficient to refer to the exigencies of social life. The solution of the problem can only be discovered by an enquiry into the means by which these rules have been established.

(*d*) Cf. Johnson's "Rasselas" and the curious mediæval Arabic speculation "Hayy ibn Yakzan."

(*e*) This doctrine of solidarity (*Le Solidarisme*) is very popular to-day. It insists upon the debt which the present owes to the past and upon the dependence of each one of us upon the whole. "Le solidarisme élargit notre conception du droit individuel: au lieu d'enfermer l'individu dans son moi, de l'isoler, de le placer vis-à-vis de ses semblables et vis-à-vis de l'Etat dans une attitude constamment défensive, il l'amène à comprendre qu'il ne peut atteindre son entier développement que par la société, qu'elle a besoin de lui, et qu'il ne peut se passer d'elle." (M. Charmont in "La Renaissance du Droit Naturel," p. 149, where the doctrine of "le solidarisme" is explained and criticized.)

Rules of conduct of which rules of law are only a form are a necessary condition of social existence, and as men cannot live except in society they are an essential condition of the individual life. See more fully Duguit, "L'État," Chaps. I. and II.; Demogue, "Les Notions Fondamentales du Droit Privé," Chap. VIII.

Of these means the four most important are Custom, Agreement, Religion, and Command.

(1) Custom has at all times and does still influence greatly the lines of men's conduct. To imitate that which others do, or to repeat that which they have already learnt to do, is so much easier for men than the striking out of new and untrodden paths. Almost mechanically men follow the old road, and personal habit or social custom becomes second nature.

That custom has played an important part in establishing social rules is indicated by the derivation of the words "morality" and "ethics," which denote the rules and principles which ought to govern human conduct. "Morality" is derived from a Latin word which means custom, and "ethics" from a Greek word having the same connotation.

Whether or not ethical principles should be treated as merely customary in origin, there are undoubtedly very many other rules which can claim no other authority. In matters of dress, manners, forms of speech, and the like, men are governed by custom, sometimes of a purely arbitrary character. What influences of climate, what accidental impulses, what peculiarities of famous people produced this or that usage it is difficult to say. Once established in power, the rule of no tyrant is more exacting than that of custom.

(2) In the second place, rules of conduct come to be established among men by Agreement. The philosophers of the eighteenth century found in agreement by the "Social Contract" the origin of government and of the binding force of law. Although these speculations were historically unsound, there can be no doubt that tacit or explicit agreement is the origin of many social rules. Tacit agreement generally takes the form of custom. Hence the frequent identity in meaning of the words "Custom" and "Convention." But existing rules of conduct are frequently altered or new rules established by explicit agreement. Treaties between nations

establishing rules to govern their relations furnish examples, and in the private life of men agreement and arrangement with others form perhaps the most important factors in the determination of their conduct. ✓

(3) Side by side with Custom and Agreement there is another powerful influence at work in establishing rules of conduct, namely, Religion. It is indeed often difficult to separate the part which religion plays in regulating men's actions from that performed by custom. Men often regard as of divine origin rules which are in reality customary. This was particularly the case among primitive peoples. The people believed the customs of their tribe to have been commanded by their gods and obeyed them the more willingly on that account.

Anthropologists have shown us to how great an extent Religion, or its predecessor, Superstition, determined and still determines the conduct of savage peoples. The customary rules of the tribe found their sanction in fear, not of the physical force of the Government, but of supernatural forces. This curious and interesting subject may be studied in a recent book by Sir J. Frazer, "Psyche's Task." In this book the author gives innumerable examples to prove how superstition has been, and is the bulwark of many social institutions. It is most relevant here to draw attention to the way in which belief in the divinity of kings, or their supernatural powers, has tended to induce obedience to their commands. One of the most striking examples is indeed furnished by Egypt. In Ancient Egypt the king was believed to be a god. The royal race was held to have descended by the great Sun God, Ra, and the Pharaohs always described themselves as deities. Thus the inscription on the obelisk at Matarieh describes the king as "Horus (*i.e.* the youthful Sun God); the one born of life, the son of the Sun, the Golden Horus, the beautiful God" (*f*). But examples of so well known an ascription need hardly be quoted. And Egyptian ideas in this matter are so far from being peculiar that one might almost treat it as a universal principle that, in the early history of kingship, the king was not merely the religious leader of his people, but the incarnation of the tribal deity (*g*). The influence of superstition on the

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(*f*) Compare Erman, "Life in Ancient Egypt," Chap. IV.

(*g*) See more fully Frazer, "Psyche's Task" (2nd ed.), Chap. II.

observance of social rules will be referred to again later. It may certainly be doubted whether this notion of divine kingship is even without power in civilized monarchial countries at the present day.

(4) In the fourth place, many rules are set by the command of a superior authority to whom obedience is rendered by the members of the society. In the family the commands of the father and mother are obeyed by the children who form the subject members of the little group. Indeed in any group of men acting together for common ends, such as a club, there is likely to be found some rule-making authority. And in that larger society known as the state there exists also a power authorized to make rules which the members of the state recognize as binding.

The same causes which brought the rules into existence frequently induce obedience to them. Mere habit tends to secure obedience to rules which have been already established. And, further, the habit of obedience to an established superior authority leads to the acceptance of its further commands and acquiescence in its claims. This fact is one of the great obstacles to successful revolutions. The habit of obedience tends to make men hesitate to attempt to overthrow the existing authority. And, moreover, it is often found difficult if not impossible to obtain the same obedience for a new authority as that which was rendered to the old and superseded one. The history of the English and still more so of the French Revolution sufficiently testifies to this. Few things are more difficult than to root out of the heart of men an established tradition in favour of particular rules and of homage to be rendered to ancient authorities. And the attempt is frequently fraught with peril to the society. The break-up of tradition may lead to the dissolution of the society.

Closely allied to habit is the recognition by the more enlightened minds of the value of rule as a necessity of social life. Men feel it a social duty to obey the established rule

of disobedience. When they yield only to force there is disease in the body politic. Yet if the force were not lurking behind, ready for application in case of need, a steady and sure disintegration of the habit of obedience would quickly show itself.

*Law and the State.*—Law, we have seen, consists of authoritative rules of conduct. The object with which the rules are instituted is the maintenance of order, and the basis of the authority which they have for men is to be found ultimately in force.

It is clear that all rules of conduct do not fall within the scope of the lawyer. In the practice of his profession he is only called upon to apply the rules recognized as law in the Courts within the jurisdiction of which the matter falls. In speaking of this kind of law there is generally no need for lawyers to use any special epithet to describe it. For when they speak of law simply they must be taken to mean that kind of law which belongs to their province as lawyers. But when it is necessary to use a distinguishing term it is spoken of as the Law of the land, or more generally as Positive Law.

The most cursory examination of the organization of a modern state will prove that one of its most important functions is the administration and enforcement of law. The state establishes Courts which are open to all between whom a legal dispute has arisen, and it lends its assistance to the successful litigant to enforce the decision which the Courts have given. Moreover, it is the state which is mainly responsible for the pursuit and punishment of those who commit serious breaches of the law. Again, in every state there exists some person or body of persons recognized as competent to make new laws. In Egypt a decree of the Sultan is law. In England a statute enacted by the King in Parliament is law. As such it will be applied and enforced by the Courts. To make laws is one of the most important functions of the state, and the legislative authority by force of circumstances occupies a dominant position in the government of the state.

These facts indicate a close connection between law and the state. The law depends upon the state for its enforcement. The bulk of the rules of law are made directly by the state, or at least enforced by it.

Up to this point in the argument there is general agreement among thinkers as to the nature of law. All are agreed that law is in fact enforced by the state in modern times (*m*). But there is disagreement as to whether this enforcement is an essential characteristic of law or not. The problem may be presented in this form. Does a rule become a rule of law because it is enforced by the state, or is it enforced by the state because it is law?

It is impossible to discuss fully this difficult question within reasonable limits of space. It is, however, worth while to indicate in outline the views taken by some leading writers upon the subject.

The principal division of opinion is between those who hold that the only rules properly termed law are those enforced by the state, so that state enforcement is characteristic of all law, and, on the other hand, those who argue that the dominant characteristic of law is to be found in its social function, *i.e.*, in the purpose which it serves in the community, and not in state enforcement. Writers of the first school are sometimes termed *Analytical*, because they proceed by analysis of the idea of law in the modern state, and set forth as the essential elements in the idea of law those elements which their analysis shows are implicit in our conception of state law to-day. On the other hand, writers who emphasize the social function of law as its leading characteristic are sometimes said to belong to the *Historical*

(*m*) I reject as irrelevant all theories of law which include in it rules not enforced by the state. These theories belong to a past epoch. In a later chapter something will be said as to so-called "Natural" law and its relation to law, properly so-called, *i.e.*, the law of lawyers.

School, because the study of the history of law and of social institutions generally suggests the conception of law which they put forward since it tends to show how minor a part the state has played in law making in the past.

The use of these terms is not, however, to be altogether recommended. As lawyers we desire to ascertain what are the characteristics which distinguish social rules which are law from those which are not law, and to find this out we must analyse the idea of law in the sense in which the term is used by lawyers. But this analysis need not blind us to the fact that law is not a mere product of Government, but at once a condition of social life and an expression of changing social ideas.

We shall now proceed to consider Law in these two aspects, firstly as a body of rules enforced by the state, and next from an historical point of view, as an outcome of social life. The first complete analysis of law treated as a body of state-enforced rules, made by an English writer was due to John Austin (n).

In a famous series of Lectures on Jurisprudence delivered at the University of London between the years 1829 and 1832, Austin worked out and set forth with laborious precision his theory of the nature of law. According to him law was founded upon force, and upon force which was applied by the supreme power in the state. These lectures were subsequently published, and Austin's views as to the nature of law will be found fully explained in the first six chapters of the published work. His ideas were not wholly original, and his merit consists in having developed and given precision to an idea of law already formulated. Thomas Hobbes (o), for

(n) 1790-1859. Professor of Jurisprudence at the University of London.

(o) 1588-1679. A famous political philosopher. His "Leviathan" is an attempt to formulate a theory of the state founded upon a

example, had long before stated the essential feature of Austin's theory, that all law is in the nature of a command : " Law in generall is not Counsell, but Command, nor a Command of any man to any man ; but only of him, whose command is addressed to one formerly obliged to obey him. And as for Civill Law it addeth only the name of the person Commanding, which is *Persona Civitas*, the Person of the Commonwealth " (p). Austin's theory starts with the proposition that all law properly so called is in the nature of a command. A command is the signification of a wish by one person that some other person shall do or forbear from some act coupled with a threat on the part of the person commanding that he will visit the other with some evil in case of non-compliance. Commands are either particular or general. Only general commands are entitled to the name of law (q). Of such commands some are set by God to men, and these form the Law of God or Divine Law. Others are set by men to their fellows. Of these latter some are set by political superiors, that is to say by persons who exercise government in a political society or state ; these form the Positive Law of the state. (There are other rules set by men to men which do not fall within the definition of Positive Law because they are set by superiors who are not political. Such, for example, are the rules of a club.

As indicated above, Hobbes had traced the origin of the Positive Law (or Civil Law, as he termed it) to the will of the person who represented the power of the state. As a matter of fact Hobbes was a strong believer in the wisdom of monarchical government and in his view therefore the power of the state ought always to be wielded by a single person. This, however, does not affect his theory of law, nor that of Austin, who developed it.

compact between the subjects establishing a common sovereign whom they mutually agreed to obey.

(p) " Leviathan," Part II., Chap. XXVI.

(q) As to the generality of law, see further below, p. 83.



Following Hobbes, Austin asserted that in every political society or state there exists some determinate person or body of persons possessing supreme power. By this he did not mean that government ought to be conducted by a monarch, or by an oligarchy. Indeed he did not seek to maintain any opinion as to the particular kind of government proper to a civilized community. He was merely stating a matter of fact. The fact was that a state could not be organized unless the ultimate power were vested in some determinate person or body of persons. Consequently every state was capable of division into sovereign and subject.

The Positive Law consisted of the commands set by the sovereign to the subject. Thus the ideas of Law and Sovereignty were inseparably connected. Law implied sovereignty, for it consisted of the commands of the sovereign.

*Sovereign could enforce*  
The sovereign who commanded could, of course, enforce. For power to enforce the command is of the essence of the idea of command. Law is therefore based on force. A rule becomes a rule of law only when the sovereign in the state commands obedience to it under threat of coercion if that obedience is not rendered. The sovereign himself is necessarily above the law.

When it is said that there must exist some ultimate and legally irresponsible sovereign in every state, this must not be taken to mean that the sovereign can in fact do what he pleases. The British Parliament was the type of the sovereign of which Austin spoke; and as it has been wittily remarked, "Parliament can do everything but make a man a woman or a woman a man" (r). But although according to abstract legal theory the sovereign can do anything, he is in

(r) "It is a fundamental principle with the English lawyers, that Parliament can do everything except make a woman a man or a man a woman." De Lolme, "The Constitution of England," Book I., Chap. X. De Lolme's book, originally published in French and of which an English translation was first published in 1755, is a brief

fact restrained, either indirectly by motives of expediency or directly by representative institutions and the like, from issuing commands which the people are not likely to obey or of which they do not approve (*s*).

Rules which cannot be described as commands are not, according to Austin, rules of law properly so called. Thus the rules of morality, though frequently styled "Law," are not properly so called. For they are not set by any determinate man or body of men. They may indeed be regarded as set or laid down authoritatively, but the authority which sets them is not determinate. It is the opinion of an indeterminate number of the community.

International Law, which consists of the rules observed between states in their relation with one another, also fails to comply with Austin's definition of law, and for the same reason. Its rules are not imposed upon nations by a supreme authority. They exist only as a customary code of conduct or by particular agreement between individual states. No central power enforces obedience to them.

Austin's theory involves, therefore, the following propositions: (1) All law is in the nature of a command. A command necessarily implies the will and power to enforce it on the part of the person commanding. Law therefore rests ultimately on force (*t*). (2) Since law consists of

and acute study of the principles of English constitutional law in the eighteenth century.

(*s*) See Note B at the end of this chapter for a consideration of certain difficulties in Austin's theory of sovereignty.

(*t*) With Austin's conception of law as resting upon the force of the state may be compared that of von Ihering:—"Law is currently defined as 'the sum total of the compulsory rules prevailing in a state,' and in my opinion this is entirely correct. The two factors which it includes are the Rule and the realization of the Rule through Force. Now only those social rules deserve the name of law which have behind them Force, or, since the state alone is the representative of the compulsory power of the society, the Force of the state. And this fact involves the conclusion that only those rules which are thus made

commands it must issue from a determinate person or persons. Positive Law is the law of a state. It consists of commands set by the sovereign of the state to the subjects.

The theory has the merit of being precise and easily understood. It brings out clearly the dependence of law, both for its establishment and its enforcement, upon the central authority in the state, which to an increasing degree is its most marked feature in the Western World. Certain points, however, require elucidation or provoke criticism. *Criticism*

In the first place it is objected that law is not always found in the form of commands, and, which is more important, it often cannot be reduced to that form. A command is an order or injunction to do or to abstain from doing some act under threat of coercion or punishment in the event of disobedience. Now much law is merely permissive. Thus the law permits a man to make a will, it does not force him to do so. It grants a liberty to make a will and it may prescribe certain forms as necessary in order to avoid dispute as to authenticity. But the grant of such a liberty cannot be construed into a command. *Procedure*

So, again, many rules of law, *e.g.* those regulating the procedure of the Courts, can hardly be described as commands. Normally, no one is bound to bring an action if he prefers not to do so. The same is true of most of the rules of Civil Law. The law tells us, for example, in what cases mistake will vitiate a contract, but it does not order us not to make mistakes. *must*

These are, however, formal objections only. In the first place, all rules of law are compulsory within their scope. Though the law does not oblige a man to make a will, it does

effectual by the state are rules of law, or, changing the phrase, that the state is the only source of law." \* *Der Zweck im Recht*, Chap. III., § 10.

oblige others to observe the will if it is made. And so of other cases. The form of the law is merely a matter of convenience, and the form usually adopted is not that of direct prohibition, but of rules addressed to the judges or other state authorities, directing them in what way they are to employ the coercive force of the state. Indeed, Ihering lays down broadly that law is always addressed not to the people but to the state authorities. "Every legal rule, every political imperative is characterized by the fact that some bearer of political force is entrusted with its practical realization." A very large number of legal rules are undoubtedly binding only on the judges or other state authorities concerned with their application, *e.g.* rules establishing the age of majority, rules of interpretation; and even a Penal Code may be represented as being a body of commands addressed to the judicial authorities directing them as to the acts which they are to punish and the methods of punishment to be used.

The coercion applied by the state can, as Ihering points out, only be realized through the state authorities, and law may thus be treated as "the machinery of coercion organized and wielded by the State force" (*u*). But though in form it may be true to say that rules of law are addressed to the state authorities, and this way of treating the law may enable us to meet some formal objections to the view that law is made up of commands, yet we must not suppose that the commands are not also binding on the community. The sovereign orders his judges to punish certain acts with certain punishments, or to decree damages against persons who do certain injuries, and he does this for the purpose of controlling, through the action of the judges, the actions of his subjects. The same phenomenon of the indirect command repeats itself in other spheres of life. The headmaster who directs his assistants to follow a certain system of marking and a

(*u*) "Der Zweck im Recht," Chap. VIII., § 11.

certain graduation of punishments is in reality seeking to control the actions of the pupils, and uses the method of issuing orders to his staff only as a means to that end. ✓

Further objection is taken by those who point out that a considerable part of the law, even in a modern state, is not set directly by the sovereign. In England much law is made by the judges by means of decisions in the Courts. In the past, and still even to-day, law is made by the practice or custom of people in the conduct of their affairs. Austin avoided this difficulty by saying that what the sovereign permits he commands. That which the sovereign permits a judge to order and which is enforced as law when it is ordered must be taken to represent the command of the sovereign. ✓

Whether this is an adequate answer may be questioned. As is remarked by Mr. Gray (x), "It is certainly a forced expression to say that one commands things to be done, because he has power (which he does not exercise) to forbid them being done." And as this writer points out, the Courts, in deciding as to the law to be applied, do not regulate their interpretation of statutes or their application of principles of equity by the consideration of what may be presumed to please the state, but by precedent, doctrine, motives of morality and the like (y). ✓

But here again the objection is one rather of form than of substance. It is true that many recognized rules of law are not to be found in any body of rules directly promulgated by the sovereign. But if the state chooses to treat decisions upon points of law already delivered, or well-established

(x) "Nature and Sources of the Law," § 194.

(y) It might, however, be replied that though the Courts do not try to please the administrative authorities of the state, they do base their decisions on what the state which has ruled in one way in certain cases might be presumed to be likely to rule in the circumstances of the case before them.

popular custom as binding upon the judges appointed to declare and enforce the law, it is merely making use of a peculiar but convenient method of legislation. The rules so laid down are part of its directions as to the administration of justice.

What, however, is to be said as to that part of the law which regulates the Constitution of the state and of the sovereign authority itself? This forms the "Constitutional Law" of the state. More will be said as to its character in a subsequent chapter (z), but it is difficult indeed to see how rules regulating the constitution of the sovereign power can be described as commands of the sovereign. Indeed the impossibility of fitting such a law into Austin's definition compelled Austin himself to deny it to the quality of true law. He speaks of it as a compound of positive morality and positive law. But to deny the name of law to such a rule, for example, as that an English statute can only be made by the King with the consent of the Houses of Parliament seems an abuse of the term.

There is no sound answer to this criticism, at least, as regards those Constitutional rules which determine in what authorities the ultimate power is placed. The sovereign cannot have a power above him, a creator cannot be created. The law fails here to be coercive. Yet though the nature of his office makes it impossible to subject the sovereign to a coercive law, we are not precluded from speaking of the rules of the Constitution as law, for "they lay claim to the same unquestioning regard and validity as are realized in all other legal rules by means of coercion" (a) and by intention are

(z) See below, Chap. VI.

(a) Ihering, "Der Zweck im Recht," Chap. VIII., § 10. Ihering's views and those of other writers of the same school are stated and criticized by Duguit in "L'État," Chap. II. M. Duguit treats law as a necessary condition of social existence and as anterior in idea to the state which may, therefore, be limited by it, "Even admitting for a moment with Ihering that the rule of law cannot be conceived otherwise

law, though sheer impossibility prevents coercion from reaching them.

It is, however, necessary to remember that the force which the sovereign of the state wields is only his because he represents the community itself. } Ultimately his power rests on the willingness of his subjects to submit. The fact that the force exercised by state authorities is really the force of the community itself is obscured under purely autocratic government, and is more obvious in proportion as the wielders of the power are constitutionally responsible for their actions to the members of the community. But obscured though it may sometimes be, it yet remains true. Unjust and unpopular law may be made, gross abuses of power may occur, and yet the people may be quiescent. But in actual fact there are limits to this quiescence. If it were not so, law would lose all the value for men. Habits of obedience, personal fear, lack of co-operation in action, may all combine to check (resistance) to the will of the sovereign. ) But unless the people are willing if driven to it to fight for their rights the law becomes merely a matter of caprice and loses its social importance. "Behind the law stands a people who see in it the conditions of their own existence and recognize a violation of it as an injury to themselves, a people of whom it may be predicted that in the last resort they will enter the lists for their law" (b). This is particularly true in reference

than as accompanied by social coercion, must we conclude that it cannot exist till after the social organization of the social coercion? Organization will give the coercion greater force, but will not create it; it will strengthen the rule of law; it will even assure a definite respect for it. But it will not create this rule of law which existed not only before the organization of the coercion which is its sanction, but even before men were conscious of the coercion, from the simple fact that men live in society." Views of this kind appear to me to rest upon a mistaken conception of the difference in function in social life between a social rule and that special form of social rule which is Positive Law.

(b) Ihering, *op. cit.*, Chap. VII., § 11.

to the law of the Constitution. A violation of Constitutional rule is likely to excite more popular hostility because it strikes directly at the mass of men and not simply at the individual. The enforcement of that law must depend directly upon the force of the community. Herein it differs from the bulk of Positive Law, which is enforced directly by the state and only indirectly by the community through the state.

It is indeed a defect of Austin's theory that it allows no play to the popular element in law. In the modern state law takes the form of rules enforced by the sovereign. But behind the authority of the sovereign stands always the authority of the people. Ultimately the power of the law must rest upon popular desire to obey. This limits the sovereign power and directs legal developments. This idea is eloquently expressed by von Ihering: "The stability of the law depends ultimately upon the strength of the national feeling for law (Rechts-gefühl). The power and authority of the law imposed by the sovereign (Gesetz) is at precisely the same level as the moral power of this national feeling; if it be nerveless the law is unstable, if be sound and hearty the law is stable" (c).

Austin, engaged in the analysis of the form of law in the modern state and finding that it is expressed as commands issued by the sovereign authority, denies the name of law to all other obligatory rules. Yet it is not necessary to go far afield in order to find a body of law which in the eyes of those who obey it certainly does not owe its authority to state imposition.

The Mohammedan world furnishes us with a conception of law which can only with difficulty be brought within Austin's definition. For Mohammedan law owes its obligatory character not to the authority of the state which enforces it but to the authority of the religion which prescribes it. In

(c) *Op. cit.*, Chap. VIII., § 11.



naturally within the law-making power of the state. But all these matters were fixed in older communities, not by the decrees of the sovereign, but by custom; and the custom varied in different localities. Of course, among a people of the same origin similar customs might be found to prevail even though they were scattered over a wide extent of territory. And a common religion created also a similarity of rules whenever, as in Judaism or Mohammedanism, the law was a part of the religion. But the point to which it is necessary to draw attention is that the rules governing those matters, the bulk of which are now, even in Egypt, regulated by state-made and state-enforced law, were not regarded as created by the state, nor very frequently had the state much to do with enforcing them. The great empires of old were often little more than military occupations of territory, which continued just so long as the ruling race managed to keep itself in power. The conquerors had their own customs, which they duly followed. But what they expected from the conquered people was payment of taxes and support in their wars. An energetic ruler would no doubt see that public order was kept within the bounds of his dominion, but the modern idea that one of the principal functions of the state is to make and enforce new rules for its subjects, regulating their everyday relations [one with another] was almost entirely absent. Yet it would be ridiculous to say that there was no law. The customary or religious rules which govern these self-same matters were as carefully obeyed as are the rules of state law to-day. How then can it be said that the essential feature of law is state command?

Custom has already been mentioned as one of the sources of rules of conduct. There can be little doubt that in certain times the form taken by the law was that of custom rather than that of command.

It may seem paradoxical, but it is nevertheless true, that advanced civilization is necessary before law can be

regarded as resting its authority upon the will of the state. Law which is made by the supreme power in the state declares thereby its human authority and transitory character. In early society the difficult problem was to get obedience. Custom and religion taught and trained men to obedience. Until habits of obedience are learned, or, to use the English phrase, until a law-abiding spirit is infused into the community, radical and frequent changes in the law are impossible. Thus the rigidity which marks customary and religious law was itself a necessary discipline <sup>(h)</sup>. But the custom of early or semi-civilized communities bore the marks of true law. It was observed in much the same way as state-made law is observed to-day. Arguments were founded upon it similar in character to the legal arguments of to-day, only there existed no state sanction for compelling observance. The situation was in fact similar to that now occupied by the Law between Nations (International Law). And just as nowadays disputes upon questions of International Law are often submitted to voluntary tribunals, so in early days men had recourse to arbitrators of their choice for the decision of their disputes <sup>(i)</sup>.

As the central state authority grew in power the Courts of the state superseded these primitive methods. The state took upon itself the function of compelling obedience to the rules recognized as law, till finally these rules have come to be regarded as the expression of its will. But through long centuries the development of the law owed little or nothing to the direct action of the sovereign. Law was the outcome of popular practice and not of the will of the sovereign. This fact is obscured to-day by the striking but modern activity of the state as a law-maker which leads men to emphasize

(h) See Bagehot, "Physics and Politics," pp. 25-27.

(i) See Maine, "Ancient Law," pp. 374-378, where this aspect of early Roman procedure is discussed. The difficulty is further explained in Pollock, "First Book of Jurisprudence," pp. 24 *et seq.*

unduly the importance of the legislator. They are apt to speak as though the law springs ready made from the law-giver's mind, and that this is its natural origin. But the history of Roman and English Law and also that of Moham-medan Law shows how false is this view. In none of these cases did the legislator play a prominent part. In the period during which the principles of the law were being established and worked out the legislator was strangely silent. The decisions of the Courts, the opinions of professional writers, and the force of popular usage, each with varying importance in different countries, established rules of law and brought into being a system adapted to the needs of the community.

Indeed to regard law as essentially the creation of the sovereign is not only to falsify history but to make the law incomprehensible. Law can never be understood unless it is studied as a growth and its history made to explain its present condition. The law of one generation is the product of the law of the generation which preceded it. Changing conditions of life modify the law from one generation to another, but there is seldom a break in the chain. Men receive from their fathers that which they hand on to their sons. The changes which they introduce, if the age is one of change, are but the expression of the changing conditions of the life of the time. The unity of development is always present. The history of the law of any people is one aspect of their social history, and it shares the unity which the society itself possesses (*k*). The truth of this fact is more obvious when the law is not the product of direct legislation, but is due to the silent growth of custom, or is the outcome of unformulated public or professional opinion. But even when the legislator is active, as he is in these times, the same close relation between the law of the present and that of the past may be noted, and also the same dependence of law upon the general public opinion of the community. And

(*k*) See note C at end of chapter.

this is true whatever may be the particular form of government, autocratic, bureaucratic, or democratic, which the country possesses. For the most self-willed despot is usually quick to know the limits of his own power. And the last thing which he would rashly disturb are the rules of law to which the people have become habituated as governing the ordinary routine of their lives.

It is in the light of such considerations as these that a theory of law has been built up which finds its basis not in the fact of imposition by a supreme authority, but in the assent and obedience of the people.

This is the theory sometimes spoken of as the Historical theory, as being mainly derived from considerations arising from historical study while, as above remarked, theories such as that of Austin are spoken of as Analytical because they arose from an analysis of the idea of law as it exists to-day. But it must not be supposed that the view adopted by writers of the so-called Historical school are to be treated even from an historical point of view as uncontested. We have yet much to learn as to the origin and functions of law, and history gives but ambiguous answers to those who explore the minds of past generations in order to ascertain the basis of their idea of law.

It is, however, at least, clear that the obedience rendered to law has not always been due to its enforcement by the state authority. Indeed everyday experience goes to show that so far as men's wills are ruled by their sense of justice the enforcement of the law by the state is for them unnecessary. Such enforcement is a sign of disease. It ought not to be regarded as a natural quality of law (*l*). The

(*l*) Cf. Grüber, "Einführung in der Rechtswissenschaft" (Introduction to the Science of Law), p. 21. "The binding force of the rules of law rests upon the assent of the members of the community; in other words, the rules avail because the members regard themselves as bound by them, observe and respect them. Consequently compulsion is no essential part of the idea of law in the sense that the

explanation of the nature of law is rather to be found in its history and social function (*m*).

The eminent German jurist, Carl von Savigny (*n*), was one of the earliest advocates of this view of law, and he has been followed by many both in Germany, England, and France. Savigny dwelt mainly upon the necessity for the existence of rules in order to harmonize the freedom of the individual with that of other members of the society. Law from this point of view was "the rule whereby the invisible border line is fixed within which the being and the activity of each individual obtains a secure and free space" (*o*). But

conditional exercise of an external power necessarily influences the observance of its prescriptions, although the tendency to compulsion is implicit in these prescriptions in conformity with their character as the declared will of the community. This leads in its turn when occasion arises to the establishment of regulations as precautionary measures against the disobedient and to the organization of force for the purpose of carrying them into effect."

(*m*) An interesting comparison may perhaps be instituted between the historical or evolutionary theory of law discussed in the text and the views of the Mutazalas or followers of Wasil-ibn-Aata as explained by Mr. Syed Amir Aly.

"The Mutazalas maintain that justice is the animating principle of human actions being the embodiment in action of the dictates of reason. They maintain further that there is no eternal immutable law as regards the actions of man and that the divine ordinances which regulate his conduct are the result of individual and collective development; that, in fact, the commands and the prohibitions, the promises and the threats which have been promulgated among or held out to mankind, have invariably been in consonance with the progress of humanity, and that the Law has always grown with the growth of the human mind" (Mohammedan Law, Vol. I., p. 12).

(*n*) Carl von Savigny (1779-1861) was a German jurist of international eminence. His great work "System des heutigen römischen Rechts" (Theory of Modern Roman Law) was an epoch-making publication, and his writings upon Private International Law are still much quoted. Savigny did not, strictly speaking, expound a theory of law but the historical conception is implicit in his works.

(*o*) "Man stands in the midst of the outer world and that which is most important to him in his environment, is his contact with

the need for law is also strong in order to regulate common action on the part of the members of the community with a view to the achievement of common social ends, and this point of view has accordingly been emphasized by other writers (*p*).

In conformity with this need law has come into being, not first in the form of abstract rules, but in the practice of the people. Custom, and custom which was principally concerned with ritual, was its earliest form. This could have no other origin than popular consciousness of the need for law expressing itself in such practical form as was best suited to the civilization of the day. But the need which thus expressed itself among semi-civilized people found more abstract expression as society became more completely organized. From custom man rose to legislation. But legislation and indeed all other forms of law are only products of the same social need. And it is only in this aspect that law can be properly understood.

In the organized state the functions of law-making and law enforcement are exercised through the central power. Custom falls into the background. But this fact does not

others like him in nature. If in spite of this contact men are to continue free in their relations with one another, materially assisting not hindering, this will be possible only through the recognition of an invisible boundary within which the existence and activity of each individual gain free and secure scope. The rule by which these boundaries and that free scope is determined is the law." "System," § 52.

(*p*) See Lightwood, "The Nature of Positive Law," Chap. XII., for a discussion of this subject. There is an admirable account of the tendencies of the views of this school in M. Charmont's "La Renaissance du Droit Naturel," Chap. II. Although in the text the views of the "Analytical" and "Historical" schools of legal thought are contrasted the reader must not suppose that the one arose as a criticism of the other. On the contrary, both were originally criticisms of the now exploded idea of "Natural Law," as to which see below, Chap. III., § 6, and Korkunov, "Theory of Law," pp. 116 ff.

alter the essential character of law which must ever be found in the assent of the people who observe it, not in the will of a sovereign who is the medium of its expression. From this point of view definitions of law are found making no reference to the enforcement and imposition which form the dominant feature of Austin's conception (*q*).

The historical value and the intrinsic truth of these considerations are undoubted. Savigny and his followers present law to us as a living factor in social life, not as the dead abstraction which the Austinian theory would make it. The determining influences in the development of law must always be found in the changes in the social environment, and whatever form the law has taken it is sure to reflect these changes in its history (*r*).

But to admit this is very different from admitting that the law which lawyers study and which Courts apply is implicit in the consciousness of the people or of any section of them. As a matter of fact few lay members of the community know much about the actual prescriptions of the law, and very few could even suggest a probable answer to the question as to how the Court would be likely to decide upon some point of first impression brought before them. Whatever law may be, it is certainly not just what the people believe to be law or what they think ought to be law. Certainly the law changes as the needs and habits of the people change, and new rules have to be made to meet new circumstances. Neither the state nor the Courts create the new needs and popular practice will often force a rule of law

(*q*) Cf. Grüber, *op. cit.*, p. 20. "Law is the sum total of the rules which within any particular community are recognized as binding by its members in their social relations in conformity with their social aim."

(*r*) The influence of changing needs and changing ideals upon the law of the community is well brought out in such books as Mr. Dicey's "Law and Public Opinion in England," M. Tarde's "Les Transformations du Droit," and M. Charmont's "Les Transformations du Droit Civil."

out of the mould into which it is cast by the state, and remould it according to the requirements of practical life. The influence of popular belief and popular practice is great in law-making, but it is in legislative rules and judicial decisions that we must find the law which popular practice and belief have inspired (s).

The point of view suggested by Savigny is indeed rather that of the historian or the social student than that of the lawyer. Nor will even the historian accept as correct the notion the law grew up within the community only by a process of silent adaptation to changing needs. Savigny compared the growth of law to that of language, but it was really very different. The history of law is a history of struggle, of changing and conflicting ideals of social welfare, of fierce assertion by one party of its "rights" against the no less angry assaults of those who denied them, of violent imposition by a dominant power of rules of law upon a recalcitrant community. Like the Jewish law, which tradition tells us was addressed by God to Moses on Mount Sinai, law has come to us amidst thunder and whirlwinds. Roman Law came to its universal kingdom after long and bitter wars waged for hundreds of years throughout the Mediterranean lands; Mohammedan Law was born as a far-spreading legal system in the mighty avalanche of conquest launched from Arabia in the seventh and eighth centuries after Christ. It was by no quiet growth that our modern systems of law established their supremacy, but by battle and slaughter. So also within the community the life of the law is one of struggle. Men did not become law-abiding by instinct or as the result of philosophic reflection, but after grievous experience of the horrors of anarchy and defencelessness. The centralized state which to-day wields so calmly the Force of the community, crushing the will of those who resist, has been born in blood. It is not so much

(s) Cf. Gray, *op. cit.*, §§ 203 ff.



the product of mutual goodwill as the result of centuries of struggle. Men struggled towards it as towards a rock of salvation; and they still struggle onwards towards a wider and still more beneficent conception which will overturn the barriers which now divide community from community.

We must not, therefore, neglect the element of Force in the genesis of law, nor, again, must we ignore its vast importance in promoting legal development. Legal progress, which is one form of social progress, is not possible without force. Law developed by changing custom is but a poor substitute for law developed through the might of the state. It is the stagnation of China compared with the progress of the West (t).

Let us grant, therefore, that Austin had truth on his side when he asserted that Law was founded upon Force, as also when he maintained that the law of our day consisted of rules enforced by the state, and of those rules only. It is certainly in this form that the law presents itself to lawyers. The test of law for the lawyer must always be found in the action of the state Courts. If the rule is one which men will be compelled to obey it is a rule of law whatever its genesis may have been. By a rule of law the lawyer means a rule which the Court will apply and the power of the state will enforce (u).

The rule may or may not be in harmony with the practice of the community, for even if it be directly contrary to such practice it must nevertheless be described as part of the law of the country so long as the Courts apply it and the sovereign enforces it. ✓

The lawyer in the modern state is, therefore, justified in regarding the enforcement of a rule by the state as the

(t) The student should read Ihering's little book "Der Kampf ums Recht," of which French and English translations have been published. Cf. also "Der Zweck im Recht," Chap. VIII., § 9

(u) Cf. Gray, *op. cit.*, § 191.

decisive test of its legal character. But the use of this test for the special purpose which the lawyer has in view does not compel its application in all cases. The idea of law is embodied in many different forms, each of which approximates more or less closely to that most rigidly defined form with which the Western lawyer is familiar. Religious law is a body of compulsory rules of conduct differing from the Positive Law of the Western state only in the circumstance that it binds men because they are believers, not because they are citizens. Customary law differs still more from state-enforced law since it is imposed by an indeterminate authority. Yet it performs precisely the same functions that the law of the state performs in political societies of a more advanced type. International law, or the law of nations, so far as it consists of rules by custom or in conscience binding upon nations in their relations *inter se* occupies much the same position. It rests indeed upon an indeterminate authority, yet both as to the matters which it regulates and its treatment by jurists it partakes of the character of the Law of the state.

In Western states to-day law takes the form of state-enforced rules. A definition of law applicable to law of this character is necessary for lawyers mainly concerned with a body of law formulated and administered upon European methods. In such a definition state enforcement through the Courts should be accepted as an essential quality. "Law," we may say, "is the body of company rules adopted in the state for the direction of the conduct of its members and for the administration of its affairs, obedience to which is enforced through the Courts established by the Central authority" (x).

(x) Ihering's definition is more philosophic, but its meaning cannot be fully appreciated except in the light of his discussion of the subject: "Law," he says, "is the sum of the conditions of social life in the widest sense of the term as secured by the power of the state through the means of external compulsion." "*Der Zweck im Recht*," Chap. VIII., § 12.

## NOTE A.—REWARDS FOR LAW-ABIDING CONDUCT.

The state only very exceptionally employs the promise of reward as a means of inducing fulfilment of a legal obligation. The grant of orders and titles of honour is obviously intended not to reward or to induce obedience to the law but to encourage and show appreciation of public and social service. Rewards for law-abiding conduct appear to occur in the criminal law, but their scope is narrowly restricted. Thus under N. P. C., Art. 173, a person guilty of false coining may obtain exemption from punishment by informing against the other guilty parties. Cf. N. P. C., Art. 87. It is a public duty to inform against an offender (cf. N. C. Cr. Pr., Art. 7), and it may be therefore said that in such cases a reward is given to induce a person to give information. So also in England informers are sometimes entitled to sue certain kinds of law-breakers for a penalty, in order that an inducement may be given to members of the public to prosecute these offenders (cf. Succession to the Crown Act, 1707, sec. 28, referred to in "Laws of England," XXI., p. 658, note (a)).

But these cases are exceptional. It has sometimes been suggested, however, that the law is conferring a reward when it gives rights or facilities for the exercise of rights to persons who comply with conditions prescribed by it. Thus transcription of the instrument of sale enables it to be used against third parties claiming a real right in the land (N. C. C., Art. 611). The law, it is said, rewards the person who transcribes by allowing him to maintain his right against third parties. But this does not seem to me to be a correct way of viewing the matter. In such cases the law is merely defining the conditions under which it will recognize an interest, *i.e.*, create a legal right. Transcription, for example, is not desired by the law for itself. The law does not seek to induce people to transcribe in the belief that the act is beneficial to the individual, or to the society. It is a convenient method of publication and is enjoined merely as a condition of the protection of certain interests in land in order to avoid disappointment on the part of others who have also acquired interests. If we say that this protection is a reward for transcription, why not say that the law rewards a testator who has made a will in the required form, by enforcing it, or rewards a person who begins an action by summons, by trying the case. Clearly in all these cases the law is not pronouncing rewards but defining conditions for the protection of interests.

Of course the law might make use of true rewards to induce law-abiding conduct. Instead of fining a man who breaks the law it might provide a fund out of which would be paid rewards to every person who had not broken the law during a certain period. Indeed

under the English Old Age Pensions Act, 1908, sec. 3, people were disqualified from receiving their old-age pension during the ten years which follow imprisonment for any offence. This provision may be represented as putting a premium on law-abiding conduct. But the object of the legislator is here, as elsewhere, rather to penalize the law-breaker than to reward the law-abiding citizen. Exemption from penalty may always be represented as reward, but for purpose of classification we must inquire whether the authority in question seeks primarily to give exceptional gratification to some person by reason of his acts or forbearances, or to visit with exceptional displeasure him of whose acts or forbearances it disapproves. The father who gives a piastre to his little boy because he was head of his class, gives a reward; but the mother who sends her child to bed early because it is fractious cannot be said to be rewarding the other children for not being fractious by letting them go to bed at the accustomed hour.

Among the Romans, however, it seems that to a limited extent a legal right to reward for social service was recognized, and actions lay if the appropriate reward, *e.g.*, military decoration, was not granted. Such decorations are now not a matter of right, but of favour only. Nobody has in England a legal right to be made K.C.M.G., nor in Egypt to receive an Order of the Nile (*y*). But a person who has fulfilled the requisite conditions has, I suppose, a legal right to receive an academic degree.

#### NOTE B.—SOVEREIGNTY.

Austin assumed that in every political society or state there must exist some person or body of persons which might be termed the sovereign. The power of this sovereign was unlimited and indivisible. The subject properly belongs to the Theory of the State and need not therefore be treated in detail here. A few remarks may, however, be made.

Austin's conception was no doubt suggested by the facts of the English Constitution. The absolute authority of the King in Parliament is a commonplace in England, but it is not shared by the representative bodies of countries which have borrowed from her their constitutional ideas. In the United States, for example, the power of Parliament is limited by certain rules which can only be changed by the National Assembly. In France it is necessary for the Chamber of Deputies and the Senate to act as one body in effecting constitutional change. Who then is the sovereign? Is it the ordinary legislature,

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(*y*) As to Roman practice, see Thering, *op. cit.*, Chap. VII., § 57.

or is it the assembly which alone has power to make fundamental changes and which meets perhaps once in a generation ?

Further difficulties present themselves with reference to subordinate legislatures, such for example as those of the Australian Commonwealth or the Union of South Africa. These legislatures have been created by Acts of the British Parliament and in legal theory they are dependent for their existence upon it. The British Parliament is then certainly the sovereign in Australia and South Africa. Yet in fact the repeal of the Australian Commonwealth Act (1900) or the South Africa Act (1909) would not be made except at the wish of the Australian people or the inhabitants of South Africa. To use the term "sovereign" of the British Parliament under these circumstances may be a convenient fiction, but is none the less a fiction.

To attempt to find an absolute sovereign under such conditions is a logical exercise of no real value. But Austin's theory of law is not to be confuted by logomachies of this description. The real obstacles to its unqualified acceptance arise from the fact that it is a generalization from insufficient historical data and that its abstract form gives unreality to the explanation it suggests of the element of popular obedience which is essential to law.

It is indeed impossible to postulate a determinate sovereign in the case of most communities. Politically it is of immense interest and importance to ask, who are the people who really hold the power of law-making and law-enforcing in any given community ? But this question is not a legal one. From a legal point of view it is only necessary to know by whom a rule must be formulated if it is to be accepted as law by the members of the community. And the question is not identical with the first. That in every political society there must be some method of establishing compulsory rules for the conduct of the members is undoubted. That the body charged with the formulation of such rules is a sovereign in the sense of being the actual person or body of persons who wield the power in the state is generally far from the truth. This being granted it follows that the community may recognize as law rules postulated by more than one body. Nevertheless there exists a unity of authority in fact. If this unity did not exist there would be a duarchy, which is only another form of anarchy. The legal form in which the will of the power behind the throne is expressed may vary with the nature of the rule postulated ; and the people will not be prepared to obey unless the legal forms are complied with. But it is not correct to say that there must be only one form of such expression in any one state.

—Austin was engaged in analysing the idea of Law, and he is right

in concluding that law presents itself to us as a rule made compulsory by the force of the state. He was attacking a theory which conceived law as existing "naturally" *i.e.* apart from the state and state enforcement. But his theory is not at bottom inconsistent with a theory of the state which treats the term only as a compendious form for expressing a distinction between communal and individual interests and regards state authorities which formulate and which enforce the law as essential parts indeed of communal organization, but not to be thought of as separate from the community. The contrast so often drawn between sovereign and subject must not be so insisted upon as to lead us to suppose that the so-called sovereign is anything more than an organ for performing certain important communal purposes.

In judging Austin's theory of the exclusive sovereignty of the state it should be borne in mind that he was much influenced by the desire to distinguish the state from other associations, such as the Church, which seem also to exercise sovereignty. Ihering, in following a line of reasoning not dissimilar to that of Austin, emphasizes this distinction (2). The sovereignty of the state must be exclusive in the sense that it alone may use force. If any other body attempts to place itself above the state or in conflict with it, the state must conquer or go under. This sort of conflict seems to be imminent in some European countries between the state and the trade unions threatening "Direct Action." This is the crucial factor in the theory of sovereignty. Questions as to the body or bodies in which the sovereignty resides are questions of Constitutional Law, and do not affect the validity of the theory.

#### NOTE C.—FOREIGN LAW IN EGYPT.

The element of permanence in the law is strikingly manifested in the history of the French Codes. France under the Revolution tried to turn back the current of French history, break away from the traditions of the past, and to establish a new heaven and a new earth erected on a strictly reasonable plan. That the attempt failed is a matter of political history. What we have to note is that the new Codes of law which the children of the Revolution produced were on the whole but a formulated statement of the ante-revolutionary law. The continuity of French legal history is complete in spite of the catastrophe of the Revolution.

It may be objected that Egypt at least furnishes an exception. For in Egypt, as in certain other Eastern countries, the continuity of

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(2) "Der Zweck im Recht," Chap. VIII., § 10.

legal history has been actually broken by the reception, not piecemeal, but *en bloc*, of a foreign system of law. Here we appear to have a perfect example of state-made law. The all-powerful legislator gives to the people laws which certainly cannot be said to be called for by any considerable body of public opinion, and which nevertheless radically change the fundamental principles upon which the law was based.

It ought, however, to be observed that in the first place the family law was left unchanged, and it is this part of the law which touches most closely the daily life of the people. In the second place the change was made after a long period of disorder and confusion in legal administration and was coupled with the establishment of competent Courts of justice. This made the reception easier. Further, a great part of the law in the new Codes affects mainly the business part of the population, already to some extent assimilated to Europeans by long contact with them.

Yet, in spite of these observations, the wholesale reception of non-national systems of law which has taken place, not in Egypt only, but to a greater or less extent in Turkey, India, Siam, Japan, and other countries, is a very striking phenomenon. The future of the law so received should be of great interest. As a plant removed to new environment adapts itself by slow changes to the new conditions of life, so we may expect to find that the European law transplanted to an Eastern country will become modified into greater conformity to national ideas. But this depends mainly upon the formation, in the country of reception, of a school of independent thought.

A word of warning is, however, necessary. It is a mistake to think the growth of law is always and everywhere a slow and peaceful process. It has already been pointed out that Force and not popular will has been the potent instrument in establishing much of the law which is observed to-day. The history of Roman Law and of Mohammedan Law show how true this is. So also, English Law, though its slow national growth within its native community well illustrates the process of adaptation to the needs of the people, has been also in part imposed by force upon alien communities, *e.g.*, India. Military conquest often brings in its train the conqueror's law, and when the conqueror has attained a higher degree of civilization than the conquered, this may be a great blessing to the vanquished race.

## CHAPTER II.

### LAW, RIGHT AND JUSTICE.

THE discussion in the previous chapter has brought to light the dependence of law upon the central state authority, while it has also led us to emphasize the intimate connection existing between the law and the popular or common consciousness of the members of the community.

But although we may be prepared to agree that law consists of rules laid down by the state authorities for the regulation of our conduct, it is quite clear that in so saying we establish only a formal test by which to distinguish rules which are law from those which are not law. The state authorities do not or ought not to make rules merely in their own personal interest. The interest which they should seek is that of the community.

A general statement such as this does not help us much. Two questions present themselves. First, we may ask what the interests of the community are, and, secondly, how far it is possible to promote these interests by law. Neither of these enquiries fall strictly within the scope of our present studies. It is enough here to say that different answers have been given to each question by different communities at different epochs, and the answers given are certain to have great influence on the law itself. Thus, in the modern world, the maintenance of individual property rights is considered a primary interest of the community, and an interest which can well be secured by law. The law of Property in consequence bulks large in our systems of law. But in a



communistic society a very large part of our law of property would disappear and in its place quite a different set of rules would appear dealing perhaps with distribution of work and rationing of the workers.

So, again, many argue that the state should as far as possible leave individuals free to pursue their own interests as they please, and should only step in where the action of one individual causes injury to others. But this doctrine of "Liberty" is now confronted with another doctrine which demands that the state should by law actively pursue the interests of the members of the community. The one school would place, for example, education outside the limits of the law, while the other considers that it is well within them, and expects the state to force its members to contribute to the education of the young and to compel them to have their own children educated. Obviously the law will itself be influenced by the dominant school of thought.

Another example which at the moment is regarded as of a more disputable character is furnished by modern state activity in securing good Town Planning. Individual rights of property may be respected, and yet it may be held as consonant with the interests of the community that they should be limited in their exercise. Ought we not to prevent owners of land from laying out streets and building houses at their pleasure, and to force them in building to conform to a scheme or plan so drawn up as to secure that the town shall develop in a manner suited to the convenience of the community, and not merely to that of individual owners? To secure these ends many modern states, *e.g.*, England, have enacted Town Planning Laws which lessen considerably the rights of property owners. Town Planning is thus treated as a social interest, and one which can be promoted by law, and the law reflects these ideas by extending its range beyond that which it occupied under the influence of earlier ideas.

We note these influences at work in moulding our law,

but it is not within our province here to discuss what the interests of the community are, nor how far these interests may be secured by the aid of law.

Our business is rather with the mechanism itself. We are concerned, that is to say, primarily with the study of the methods used by the law to secure the proposed ends. A rule of law creates Rights. The law is concerned mainly with the protection of Rights. What then is a Right? A right it is said is "a legally protected interest"; or from another point of view a right is "a species of claim allowed by the law." The law recognizes and sanctions certain claims or demands which the individual makes against his fellows, or which the state as representing the community makes against individuals. Claims so recognized constitute Rights.

To the right always corresponds a Duty, for he who is authorized to claim something from another necessarily imposes a duty upon that other to satisfy the claim. These words Right and Duty are so frequently used both by lawyers to denote legal claims, and by others to denote claims not admitted by law, that it is incumbent upon us to examine them more closely in order to understand their precise significance to lawyers.

In its primary signification the word Right denotes that which is straight, and which consequently does not depart from the direct road (*a*). Hence it is used to mean that which is in accordance with rule, as distinguished from that which varies from rule. Action which follows the rule recognized as meet to be observed under the circumstances is described as right, while departure from the rule is spoken of as wrong. Thus employed, right and wrong have often a moral signification, that is to say, the approval of an action

(*a*) See Salmond, pp. 465 ff., for a discussion of the different meanings of the word Right. Cf. Miller, "Data of Jurisprudence," pp. 35 ff. Ihering, "Der Zweck im Recht," Chap. VIII., § 11.

as a right action or its condemnation as wrong implies that it is or is not in accordance with the rule or principle of morality by which conduct under the given circumstances should have been regulated.

Since we qualify as right or wrong action which follows a recognized or approved rule, it is not difficult to understand the turn of the phrase by which the claim to act or to expect action from others in accordance with the rule is spoken of as a claim of right, or simply as a right. When a man asserts that he has a right to do some act, or to expect that others should do some act, he means that such an act would be in conformity with some authoritative rule by which his claim is justified. The breach of such a rule constitutes a wrong. Men are apt to weave their own schemes of right and wrong and to claim the authority of God or of their own consciences for the rules which in their opinion ought to regulate conduct. There exists, however, in every community a body of rules generally admitted by its members as providing proper standards of conduct, and by these the rightness and wrongness of an action are popularly judged. The admission by others of the propriety of these rules signifies that action in accordance with them will be generally approved, or, at least, acquiesced in, and it is this approval or acquiescence which makes effective claims based upon them. If the bulk of the community admits that the rule is a rule of right it becomes the right of all to act or to expect action in conformity therewith.

Emphasizing this aspect of the right, Dr. Holland defines it as "one man's capacity of influencing the acts of others by means not of his own strength but of the opinion or force of the society" (b).

This definition of a right which makes it depend entirely upon popular opinion is the antithesis of the conception of right in the older

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(b) Holland, Chap. VII., p. 81. Cf. Miller, *op. cit.*, p. 131.

systems of political and moral philosophy. A right was conceived as something innate in man, given to him by nature, and supreme in its majesty over the mere details of human law. The "Rights of Man" were independent of opinion and of law. This view was, of course, a deduction from the widely spread belief in a Law of Nature, of which something will be said in a later chapter. In this sense the word "right" is now confined to political declamation.

On the other hand, though denying the existence of innate rights, we may yet contend that the term has an allowable use of a broader character than that suggested in the text. Right is concerned with the regulation of interests, and the rights which we conceive men as having depend upon the view which we take as to the character of the interests which they claim. If they are such, as in our opinion ought to be admitted by society, judging that obligation according to an external standard, we allege the claim to be a right. The nature of the standard depends, of course, upon our ethical or social standpoint. Thus, Herbert Spencer, after formulating the general principle of justice by stating that "Every man is free to do that which he wills provided that he infringes not the equal freedom of any other man," infers from this that a right consists in the claim to the exercise of freedom in conformity with this principle (c). Certainly this wider use of the term "right" is common, and it does not appear to be ~~un-~~justifiable.

Right, therefore, is the counterpart of law. It exists only when men, formed into a society, have admitted the authority of rules for the regulation of their relations with one another. It is, at least, in this sense alone that the term has any legal meaning (d).

Lawyers, however, are not concerned with the study of all claims admitted as rights by the community. They are

(c) "Justice," §§ 27, 36.

(d) Communities at different stages of civilization have, of course, different senses of right. That which would be admitted as a right by the members of a savage tribe would be denied the term by more civilized people. Civilized rulers of barbarian tribes, have, indeed, often forbidden their subjects to do acts which in the eyes of the barbarians themselves were perfectly proper, or even obligatory. In such cases we find a conflict of standards of right, and the higher standard is made forcibly to prevail in the hope that its observance will gradually lead to its general adoption by the lower community.

interested in those only which are in conformity with rules of law, *i.e.*, of law positive. This is the specialized signification possessed by the term right when it is used as a term of law. The legal right is one protected and upheld by a rule of law. Outside the legal sphere exist other social rights generally admitted by popular sentiment, but since these have not been recognized as fit matters for the protection of the law they remain foreign to the lawyer. If Ahmed relieves Zaky in his distress, men would say that he had a right to Zaky's thanks and gratitude, since rules of courtesy and principles of morality both demand that gratitude should be expressed and felt for favours granted. Such a right is not, however, one admitted and maintained by a rule of positive law (*e*). If on the other hand Ahmed lends money to Zaky the right which he has to repayment is protected by law and has therefore a legal character.

Both legal and other rights may consist in claims not to ~~acts~~, but to forbearances. By a forbearance is meant an abstinence from the doing of some act which might otherwise be accomplished. Thus the right which a person has not to be injured or interfered with by others is a right to forbearance from prejudicial action on the part of others.

It is of the highest importance that the young lawyer should distinguish clearly between the use of the term right as a term of law and its similar use as denoting claims outside the legal sphere. The word is so freely used that much confusion is likely to result unless its precise meaning in law is firmly apprehended. A legal right is always founded upon a rule of positive law. When a claim made by a

(*e*) In a very imperfect way the right to gratitude is indeed legally recognized in some systems. Thus the French Civil Code (Arts. 955 ff.) establishes a right to revoke a gift for ingratitude shown by the donee towards the donor. But the ingratitude must be shown either by an attempt on the life of the donor or by harsh treatment of him or insults against him, or by refusing him alimentary provision (F. C. C., Art. 955). See fully Planiol, III., §§ 2638 ff.

person that he shall be permitted to act, or that others shall be required to act or to forbear from action, is a claim made in conformity with such a rule, such person is said to be the holder of a legal right (*f*). Legal rights are enforced by the state as the upholder of the law. If the state withdraws its authority the right passes out of the sphere of positive law. In the case of all legal rights, therefore, the protection and assistance which the holder of the right has in maintaining his rights are furnished primarily by the state. From this point of view Dr. Holland defines a legal right as "a capacity residing in one man of controlling, with the assent and assistance of the state, the actions of others" (*g*).

The claim by one person of a right involves the imposition upon another or others of a correlative duty. A duty is something which is due, or owing (*h*). Those against whom the right is asserted are under a duty to act or to forbear in accordance with the claim of right. When the right in question is legal, the corresponding duty must be legal too, that is to say its observance will be in conformity with a rule of law and will be exacted by the sanction of the state.

The characteristic of a right as above explained is conformity with a rule admitted among men as properly governing conduct.

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(*f*) Cf. Salmond, p. 185.

(*g*) Holland, Chap. VII., p. 82. It must, however, be remarked that a definition of this kind, though very correct as an abstract statement of the formal characteristics of a right, leaves unexplained the depth of feeling which is often contained in a man's assertion of his right. To the man who believes that the right is his, his right may be more than a mere claim to control the actions of others; its recognition and fulfilment are necessary to his self-respect. And to maintain his right is a duty which he owes not only to himself, but to the community, for, thereby, is the law justified. As Ihering has shown us, the legal order within the community cannot be maintained in a healthy state unless men are prepared to maintain their rights even sometimes at the cost of sacrifice. See more fully Ihering, "*Der Kampf ums Recht*."

(*h*) Cf. the French *devoir*.

When this rule forms part of the body of the law and has consequently the force of the state behind it, the rights upheld by it are legal. The function of the law is, indeed, the maintenance and exaction of the rights and duties which it recognizes. Legal rights as a whole follow what may be termed the moral rights recognized by the community, that is to say, the law upholds in the main those claims of which the moral sense of the society approves. Upon this question of the coincidences and variations in the respective ranges of law and morality more will be said in the course of a few pages. It must, however, be noted that the moral standards of right and wrong are not necessarily found in the opinion of the community. There are indeed certain rules of morality generally accepted in all societies which have advanced beyond the stage of pure barbarism. These form what Austin termed the body of positive morality, and it is to them that the rules of law are most closely allied. Moral philosophers do not, however, judge right and wrong by what is accepted, but by what ought to be accepted according to their own conception of the true aim of life. The study of this aim is the sphere of the science of Ethics. With this loftier conception of right the legal conception of right has less in common. The lawyer moves in the sphere of the actual, not of the ideal. The moral or religious teacher goes in front to quicken the moral sense and raise the moral standard, and the law must usually await the accomplishment of his work before following his lead.

Whether a right be moral (accorded by a rule of morality) or legal (accorded by the positive law), it must always possess the same characteristics. In all cases the holder of the right asserts a claim against others in accordance with a more or less widely admitted rule of human conduct. The idea of a right is consequently inseparable from that of social life. It is only in society that right can exist, since it is only as a member of society that men have rights (i).

It is in this sense that the assertion of the existence of natural rights must be understood. When a man asserts

(i) Cf. Green, "Principles of Political Obligation," § 137: "It is only a man's consciousness of having an object in common with others, a well-being which is consciously his in being theirs and theirs in being his—only the fact that they are recognized by him and he by them as having this object—that gives him the claim described."

that he possesses a natural right to live, to enjoy freedom, and so on, he can only mean that freedom from violence and freedom from interference for the individual are essential conditions of social life and must be generally conceded to the members of the community.

The term right is frequently abused, particularly in political controversy, it being used to give an apparent authority to a claim, which, though not made in accordance with any generally recognized rule, is one which, in the opinion of the speaker, ought to be supported by such a rule. When, for example, advocates of female suffrage assert that women have a right to vote and to share in the election of parliamentary representatives, they do not mean that they possess a legal right to do this, for it is upon the grant of such a legal right that their efforts are concentrated. Nor can it be reasonably asserted that a popular representation in the government of a country is a natural or essential condition of social life, since it is only of recent years that any considerable communities have adopted the plan of representative government. Evidently in claims of right of this kind there is a hazy reference to the exploded theories of Natural Law. The right is conceived as something subjective and innate. By using the term "right" in this way to describe some claim that they are making people often hope to give the glamour of authority to that which is really only a matter of opinion.

An interesting comparison may be made between the use of the term "right" in English and that of the corresponding words in other languages. In German the allied word "Recht" has the same signification, and to this corresponds in French the word "Droit." Thus "*les droits de l'homme*," is exactly translated into English as "the rights of man." *Droit* is derived from the Latin "*directus*," from which in English we get the word "direct," and the association of this with the idea of right is obvious. In one particular indeed the word *droit* used as an adjective does not correspond to the English word right, seeing that it does not appear to have the same moral signification. To the French word *droit* and to the English word right corresponds the Arabic "*haq*."



The words *Droit* and *Recht* besides being used to denote a claim or interest protected by the rule of law (a right) are also employed to denote the law itself. This use must be clearly understood since it is liable to cause confusion. It is not unnatural that the rule in accordance with which a right is claimed should be itself described by the same term, and in earlier times even in England this use was common. At the present day, however, the English word right is used in legal phraseology only of the claim or interest protected by the law and not of the law itself. The French, who use the same term for both of these ideas, would thus translate Civil law by the term "*Droit Civil*," just as they would translate "a civil right" by the phrase "*un droit civil*." In Arabic the same distinction is drawn as in English between the right protected by the law (*haq*) and the law itself (*Sharia*, *Qanun*).

Precisely the same double use of the same term for law and right occurred in Latin. The word "*jus*" meant "right" and was so used in phrases such as "*jus possidendi*" (the right to possess) and "*jus utendi*" (the right to use). It was, however, also used to denote the law by which the right was upheld. Thus the term "*jus civile*" exactly corresponds to the French "*Droit Civil*" and to the English "Civil law" (*j*).

The identity of the words used makes it necessary in French to employ some additional locution in order to point the distinction between law and right. The body of rules constituting the law is therefore sometimes spoken of as "*le droit objectif*" as distinguished from the rights upheld by the law which are spoken of as "*droits subjectifs*." The use of the terms objective and subjective always indicates a distinction between that which is external to the mind and that which is internal or mental. Thus in grammar the

(*j*) See Miller, *op. cit.*, pp. 33 ff., for other meanings of the word "*jus*."

subject of the verb is always the person or thing from which the action described by the verb arises, while the object is the person or thing against which the action is done. The Objective law is therefore that which is external and exists independently of the action of the individual, while the subjective right springs from the claim made by the individual against his fellow men. The law is objective because it is outside the person; the right is subjective because it resides in the person. The distinction is well put by M. Capitant: "*Le droit objectif en organisant les rapports des hommes, qui nécessitent l'établissement d'une règle, détermine et sanctionne les droits privés subjectifs que ces rapports font naître. Le droit subjectif est un intérêt d'ordre matériel ou intellectuel, protégé par le droit objectif, qui donne, à cet effet, à celui qui en est investi, le pouvoir de faire les actes nécessaires pour obtenir la satisfaction de cet intérêt*" (k).

But although the English word right is free from the double meaning attributed to the French word *droit*, the word law has to be employed to cover two meanings for which the French and Latin languages may employ separate words. In Latin the word *jus* was used as just mentioned in order to denote a body of law such as the Civil law, the Law of Nations, and the like. Particular enactments were, however, spoken of not as separate *jura* (*jus*, pl. *jura*), but as separate *leges* (*lex*, pl. *leges*). In French a similar distinction is drawn between the *droit* and *loi*. Any particular enactment passed by the Legislature is therefore termed "*une loi*," and its provisions form part of the whole *Droit français* (l), "*Une loi*," therefore, is concrete; it denotes some distinct rule or body of rules which the legislator has made

(k) Capitant, p. 87.

(l) In later Latin the word *lex* came to be used as a general term for law, and in modern French a similar broad use of the word *loi* is found. For further discussion of the uses of these terms, see Salmond, pp. 469 ff.; Pollock, "First Book of Jurisprudence," pp. 17, 18.

authoritative. In English this is described as "a law." *Droit*, on the other hand, is abstract. We cannot describe any particular rules as *droit*. All we can say is that in common with other rules they form the *droit* or law of the country. When the English term law is used as an abstract term to denote not a particular provision of the law, but the sum total of the rules recognized as such, it must be translated into French by the word *droit*.

In the explanation of the nature of law contained in the last chapter and in what has been just said as to the nature of a right, stress has been laid upon the implication in both of these ideas of the conception of rule. From Law and Right are to be distinguished Caprice and Might, from which two latter ideas any notion of rule or order is notably absent. Caprice operates by reference to personal and occasional considerations and not in accordance with general rule. In the realm of caprice no rights can arise because no rule ~~exists~~ exists by reference to which a right can be claimed (*m*). The same may be said of Might when this is contrasted with Right. Might or Power is nothing but the ability to control men's actions and bend them according to our wishes. The state exercises Might and it lends its right to the private citizen to enable him to obtain fulfilment of his rights (*m*). In this case Might is but the servant of Right, since it is exercised in accordance with a rule of right. But the possessor of power may exercise it capriciously or in accordance at least with his own will to act, without reference to any

(*m*) Speaking of the process by which Might or Force has on the civilized state gradually become the servant of Right, Ihering writes, "At the moment when force invites the law to announce its commands (*i.e.*, when the ruler begins to issue general commands), it opens its own house up to the law, and there at once commences a reaction of law upon force. For the law brings with it as its inseparable companion order and equality, and whilst at first merely a scullion in the house of force it becomes in the course of time Major-domo." "Der Zweck im Recht," Chap. VIII., § 11.

external rule (*n*). Thus war between nations is generally the exercise of pure might. Its justification is seldom to be found in the alleged "righteousness" of the cause, although each side always claims to have right on its side, and the victor generally considers that his success is in part the sanction of his claims by an overruling Providence.

The ideas of Law, Right, and Duty are intimately associated in men's minds with another notion, that of Justice, which is equally contrasted with those of Caprice and arbitrary Power.

The word justice, which is the same both in French and English, is derived from the Latin *justitia*, in its turn obviously connected with the word *jus*. "Justice," says Justinian, "is the constant and perpetual wish to render to every one his due" (*o*). However inadequate this definition may be as a statement of the ethical nature of justice it serves our purpose by connecting the idea of justice with that of law and right. What is due to a man must be ~~done~~ in accordance with some rule whether of positive or of moral law, and the doing of justice, therefore, consists in the fulfilment of the law.

Justice is an active quality. Justinian speaks of it as a "wish." It always connotes active conformity with a recognized rule of right. The judge is a "just" judge when he applies the law fearlessly and impartially; the legislator makes "just" laws when he seeks to equalize conditions among the members of the community. It is not "just" to tax the poor as heavily as the rich, or to punish the petty

(*n*) Power which the holder does not exercise in accordance with recognized rule is described as "arbitrary" because its use depends upon the *arbitrium* or judgment of the person who wields it.

(*o*) Inst. I. 1. pr. Compare Herbert Spencer's formula of Justice quoted above, p. 60. As to the Roman conception of *Justitia*, see Walton, "Introduction to Roman Law," Chap. XXXIII. And see also Ihering, "Der Zweck im Recht," Chap. VIII., § 11, for a general discussion of the application of the idea of Justice to Law.

offender with the same severity as the great criminal. For the judge the standard of justice is laid down in the law. The legislator and the individual will derive his standard from moral considerations. Thus a law may be unjust, yet the judge will not be unjust because he applies it. And the just man may feel it to be his duty to do acts which the law does not require, but which are commanded by the Moral Law.

The intimate connection between Law and Justice is brought out by the use of the latter term in legal language. This is specially noticeable in English. The Courts in which law is administered are termed Courts of Justice; the judges who preside therein bear the title of Justice (*e.g.*, Lord Chief Justice, Mr. Justice Parker, Lord Justice Vaughan Williams), and even the unpaid gentlemen who try petty cases in the country are termed Justices of the Peace. In Scotland also the same title is employed in speaking of the Courts and of the judges; *e.g.*, Court of Justiciary, Lord Justice General, Lord Justice Clerk.

The association of law with justice is indeed as close as that which exists between law and order. The purpose of the law is the administration of justice. It is to secure and maintain justice among men that law is established. Social life leads inevitably to a clashing of the interests of different individuals and to frequent conflict between the interest of the individual and that of the state or community. The doing of justice consists in the harmonizing of these different interests in accordance with accepted rule, and this it is the object of law to accomplish. It is in this connection that the coincidences and the variations between law and morality become most marked. Morality seeks to regulate the conduct of men in accordance with some personal or social ideal. Both Law and Morality are therefore concerned with conduct, but there is this great difference between the manner in which each tests the rightness of human actions, that

while Law is satisfied with purely external conformity with its precepts the moral standard is applied also to the judgment of motives of action. So long as a man does what the law commands or forbears from doing that which the law prohibits he is faultless in the eyes of the law. A final judgment upon the moral worth of a man cannot, however, be given merely by reference to his action. For moral goodness depends upon the inward state of the soul of which outward expression in action or forbearance is but an indication. The insistence upon inward purity of motive as forming the true test of righteousness is to be found to a greater or less degree in all the higher forms of religion, Christianity, Mohammedanism, and Buddhism, and it is in association with religion that moral excellence has made its most powerful appeal to men.

When it is said that law applies an external standard to men's conduct, this must not be taken to mean that the mental state which accompanies action is entirely irrelevant in law. A man who kills another with premeditation will be differently judged to one who committed the same act in the sudden heat of passion or through some negligence on his part. So long, however, as a person abstains from killing others the law is satisfied, even though his abstention may be due only to fear or lack of opportunity. But from a moral point of view "whosoever looketh upon a woman to lust after her hath committed adultery with her already in his heart" (p).

\* The external character of law necessarily limits the range of its precepts. It is not its function to cultivate the soul, and action of such a character as can only spring from goodness of disposition lies outside its sphere. Thus gratitude, charity, and mercy are moral virtues but are not demanded by the law. In modern times some actions which were formerly regarded as outside the legal sphere have been

brought within it. Such humanity as finds its expression in the kind treatment of animals and such charity as consists in the relief of the poor have to a certain degree been made the subject of legal prescriptions. But the sphere of morality must always remain wider than that of law because of the radical difference in the nature of the appeal which it makes to man.

Even in cases in which it might be possible for the law to intervene in order to secure external rightness of conduct it often refrains from doing so, sometimes because of the difficulty of proof, a circumstance which frequently sets limits to legal action, and sometimes because the actions in question, though condemnable, are not ordinarily so hurtful in their effect upon the relations of men as to justify its intervention. Lying, backbiting, and fornication, though grave moral defects, are not usually legally punishable, except when special reason makes their effects peculiarly grave. For this latter reason we find perjury, forgery, and libel within the scope of the law (*q*).

In some cases, indeed, actions which the law prohibits, or, less frequently, requires, have no moral import, that is to say, they cannot be judged in themselves as either moral or immoral. It is clearly quite immaterial, for example, whether people drive on the right or the left side of the road. In England people are required to keep to the left in driving, while in Egypt, as generally on the Continent of Europe, they are required to keep to the right. To drive on the left side of the road is not itself a wrong act, though the general

(*q*) It is not "just" that one man should suffer from the malice or carelessness of another, but in many cases the interference of the law courts would do more harm than good. "Law, strictly so called, emerges," says Mr. Miller, "under two conditions: (1) the interest dealt with must be material, and (2) must be capable of definition. If either of these two conditions fail, the question becomes one of ethics or equity, but the analogies of justice still apply" (*op. cit.*, p. 361).

duty of good citizens to observe rules of public order makes it wrongful if the law happens to prescribe that persons shall keep to the right in driving.

These instances might be multiplied. Social order is a primary interest for society, but it is often immaterial what particular form that order takes. The good citizen is he who claims no exemption from an order established in the interest of all. For laws of all sorts are in some sense servants of justice. And although there may be variations between the legal and the moral sphere within which justice is administered there are nevertheless remarkable coincidences between them. The precepts of the law are based upon those of morality. If it were not so, law would lose much of its authority for men. "Legal justice," it has been said, "aims at realizing moral justice within its range, and its strength largely consists in the general feeling that this is so. Were the legal formulation of right permanently estranged from the moral judgment of good citizens, the state would be divided against itself" (r). This fact has already been mentioned in noticing the identity of terms used in speaking of moral and of legal relations and purposes. It is equally obvious from a consideration of the nature of the matters dealt with by the law. Admittedly it is an affair both of law and morality that a man should pay his debts, refrain from injuring others, and conduct himself with due regard to their interests.

Yet, as we shall see when we come to deal with the Sources of Law, the solution of a legal problem is seldom to be found in an appeal to common sentiments of justice. Let us suppose that Ahmed, when out driving in his motor-car, sees his friend Zaky walking wearily along the road. He stops the car and offers him a lift, which Zaky accepts. Unfortunately a collision soon afterwards occurs, due to Ahmed's fault in driving on the wrong side of the road. Zaky is



badly hurt, and subsequently asks Ahmed to pay his doctor's bill. Now the ordinary man if asked whether it is just that Ahmed should pay the bill, would give an answer according to his own trained or untrained sentiment of justice. He thinks, perhaps, that Ahmed would act justly in refusing to pay, and if asked for a reason, adds that Zaky gave nothing and should, therefore, receive nothing. Transferring the question to the sphere of law we may suppose that Zaky brings an action against Ahmed, claiming payment of the bill. The Court called upon to decide the question of Ahmed's liability will not base its decision upon its feeling as to the justice of the claim. It will seek to bring the case within some recognized rule of law. It would have to consider what was the nature of the legal duty which the owner of property owed to a person whom he gratuitously invited to come upon it. If the legislator had not provided an express rule of law to govern the case, the Court would seek in such sources as were at its disposal indications of the rule which would be most in conformity with the solutions of analogous questions to which the legislator had given an answer, or (failing this) most in conformity with generally accepted legal principles (s). But it would not content itself with a bare

(s) See, for example, the judgment in the English case of *Shrimpton v. Hertfordshire County Council* (1911), 104 L. T. R. 145. In that case it appeared that the County Council was in the habit of sending a vehicle to convey to school children who lived more than two miles away. The plaintiff was a child living less than two miles from the school, but the driver of the carriage gave her leave to get in. In getting in she hurt herself. The jury found that the County Council was in fault in not providing (*inter alia*) an adult person to help the children in. It was argued that the Council owed no duty to this child, as she was not one of the children for whom the vehicle was provided. The House of Lords gave judgment in her favour. The Lord Chancellor (Loreburn) in reading his judgment expressly stated that he had sought to put aside "the sympathy which everyone must feel for the parents of the child" and had arrived at a conclusion simply according to his view of the facts and of the law applicable to them.

reference to the apparent justice or injustice of the claim.

It might happen that the conclusion arrived at by the Court would not accord with the views of the ordinary man as to the justice of the matter. This is apt to happen as rules of law grow old and the conditions of social life change. Continual adaptation of the law to changing conditions is necessary if we are to avoid conflict between legal rule and moral judgment. But although it is desirable that conclusions should be reached by the Courts which commend themselves on the whole to the enlightened moral judgment, the Courts must always reach these conclusions by the application of legal rule and not by the mere exercise of moral judgment.

The adaptation of law to changing conditions is, however, seldom complete enough to prevent conflicts between the decision of law and the moral judgment. In the hands of professional lawyers any system of law tends to become technical and complicated (*t*). Logical deduction from its principles sometimes results in conclusions which, when applied to a particular set of facts, lead to a decision not in conformity with that which our sense of moral justice demands. The legal judgment is then, as it is said, contrary to the equity of the case. Yet the maintenance of legal principle is of such importance that this evil must be overlooked. It has happened, however, more than once in legal history that the requirements of fair dealing or equity have been placed in such contrast with the rigid rules of law as to lead to the establishment of tribunals whose special mission was the mitigation of this rigidity in accordance with equitable principle. Instances of this are given in a later chapter (*u*).

(*t*) As to these vices of any developed legal system, see Salmond, pp. 23 ff.

(*u*) Chap. III., § 6.

That conflicts must arise follows, also, from certain essential characteristics of the law. Law is necessarily general. Its generality is of a twofold character (v). It is general in the first place as regards the persons to whom it applies, since a rule of law is usually applicable to a whole class of persons and not to one person in particular. It is general also as regards the cases to which it applies, since it applies to all cases of a class and does not provide special rules for each set of facts. This being so, the rules of law necessarily take into account only those considerations affecting our judgment which are present in the generality of cases. Personal factors, and peculiar circumstances which in a particular case might lead us to a different conclusion as to the justice of a claim, cannot enter into the sphere of law. Yet to leave to the judge absolute discretion to decide according to his own judgment would substitute arbitrary will for the rule of law and destroy that order which it is the purpose of the law to secure. It would indeed be the negation of law. Moreover, it is the great advantage of the rule of law that it directs men's action by fore-ordained rules. The knowledge of these rules enables men so to conduct themselves as to secure the protection of the law. Certainty in the rule is, therefore, a prime necessity. Yet in securing certainty we must abandon the possibility of obtaining that flexibility of rule which would adapt its application to varying needs. Men are rightly content to sacrifice the lesser for the greater good. It is even more important that there should be a rule by which men may direct their conduct than that the operation of that rule should in every case accord with the dictates of moral justice. It is the duty of the citizen to obey, and of the judge in his judgments to abide by, the law as it stands. To forsake the rule of the law under the plea of its apparent injustice in some particular

(v) See Pollock, *op. cit.*, pp. 37 ff., for the characteristics of legal justice.

case is but the first step to the substitution of anarchy for ordered social harmony.

The certainty of law does not, of course, depend only upon the existence of fore-ordained general rules, but upon their fearless application by the judges and by the state authorities. Admirable rules of law may exist in a country, the beneficial effect of which is wholly or partly destroyed by weak or partial administration. It used to be said of Turkey that if her administration were as good as her laws she would have been a model country. It is not the existence on paper, but the honest application of legal rules which makes them effective instruments to secure social happiness. "Law," says Ihering, "may from a psychological standpoint be defined as the feeling of security in the State," and the security of the law depends ultimately on nothing else except the energy of the national sense of right. If the sense of right is weak among the people and, in consequence the law is not actively supported by them, or if the state authorities are in the habit of recognizing special exceptions or ignoring at their convenience the rules of law the great gift of security will not be won. And the existence of security is essential not only to economic progress but to the development of national character (z).

(z) Special reference should be made to the eloquent remarks of Ihering upon this subject in "Der Zweck im Recht," Chap. VIII., § 11. There is an admirable chapter on the influence of the idea of security upon the law in Demogue, "Les Notions Fondamentales du Droit privé" (Chap. II.). Cf. Bentham, "Theory of Legislation," Part I., Chap. VII. (Principles of the Civil Code).

## CHAPTER III.

### THE SOURCES OF LAW.

#### § 1. DIFFERENT MEANINGS OF THE WORD "SOURCE."

THE word "Source" as applied to law has several different meanings.

It may be used to mean the authority which gives its force to the law (*a*). This is sometimes called the "Formal" source of law (*b*). The Formal source of modern law is the state or sovereign. Custom and religion have also been, and in some countries still are, the formal source of law, or of the rules which correspond in function to the law of the modern state.

Again, by "source of law" may be meant the historical origin of the law. The French Codes are, in this sense, the principal source of Egyptian law. Customary rules and the rules of the Roman Law are the principal sources of French law. This is sometimes called the "historical source" of law.

In the third place the bodies of rules or principles according to which a judge is bound or entitled to decide cases may be said to be the sources of law. When the judge is bound to apply rules emanating from a particular source, that source is said to be authoritative. Thus the Codes and Decrees are authoritative sources of Egyptian law, as also is, for certain purposes, the Koran.

If the source is not authoritative the judge is at liberty to make such use of it as he pleases. Thus the previous

(*a*) Holland, Chap. V., p. 55.

(*b*) Salmond, p. 117.

decisions of Egyptian or French judges do not bind an Egyptian judge; but under certain circumstances he will be likely to respect them, in which case they are the source of the law, for they furnish the judge with the rule which he proposes to apply. To distinguish these from sources which are authoritative in character, they may be termed "persuasive." In Egypt the secular Courts are generally bound only by the rules laid down in the Codes and the supplemental Laws and Decrees. These alone are "authoritative" sources of law. But, in fact, these do not and cannot suffice, and as we shall see, the judges constantly refer (in particular) to previous decisions by French and Egyptian Courts and the opinions of well-known jurists, and it is impossible not to consider these as sources of the law actually applied. But since they are not authoritative we can describe them as "persuasive" only.

It is not always easy to distinguish these various uses of the word source, for many sources belong to all three classes. Thus Custom has been the formal source of rules of law in the past, that is to say, that there was a period at which the obligatory character of law was due to custom. But custom is also the historical source of much modern law which is no longer to be found in that form. And finally in certain cases a judge may be bound to enforce what is customary as law, or may at least refer to custom to obtain a rule meet to be applied in the case before him. Consequently the discussion of custom as a source of law should deal with it in all these different aspects.

At the present day, however, the state or the sovereign is in Western states the formal source of all law. In Egypt, indeed, the belief in religion as the formal source of law survives. And although it is the sovereign who enforces (c) the law, most Egyptians would say that he is as much bound

(c) This refers, of course, to the decisions of the Religious Courts enforced administratively through the Ministry of the Interior.

to enforce it as they are to observe it. There is no need to say more upon this point, which has been dealt with already (*d*).

What the lawyer means by the phrase "source of law" is generally, however, neither the authority which makes the law, nor the historical origin of the rule, but the sources authoritative or persuasive from which he will in fact draw the rules and principles upon which he will base his argument in the Courts, and upon which he expects that the judges will base their judgments. And it is the source of the law in this sense which is the main concern of this chapter. A little further explanation of the manner in which such sources are employed may be useful.

Take, for example, a case in which a question of law is raised before a Native Court. The Native Courts will apply primarily the Native Codes, which are for them the authoritative source from which they derive the rules to be employed to settle questions of law. If, therefore, the application of the law there laid down to the facts before them is clear, the question of law is easily disposed of, however complicated and difficult may be the question of fact. The question "Did Ahmed fire a shot at Zaky?" "What intention had he in so doing?" and the like, are questions of fact to be decided according to the evidence. But these resolved, there remains the question of law, "Does Ahmed's act fall within the terms of art. 194 of the Penal Code, punishing wilful homicide?" In most cases of this sort, indeed, the application of the law to the facts once established, will raise no serious difficulty. But let us suppose, by way of example, that in a prosecution of Ahmed for the murder of Zaky it is admitted by the Parquet that the shot fired by him was intended not for Zaky but for Mahmoud, against whom Ahmed had a grudge. Unfortunately for Zaky, Ahmed, though aiming at Mahmoud, shot so wide of his mark as to hit Zaky and not Mahmoud. Is Ahmed

(*d*) See above, pp. 46 ff.

guilty of the wilful homicide of Zaky whom he did not intend to shoot, or of the attempted murder of Mahmoud whom he only aimed at? This is a question of law, depending for its solution upon the interpretation to be given to the words "wilful homicide" in the article. The Parquet concludes in favour of the conviction of Ahmed for murder, and the Court is then called upon to decide whether or not the case falls within the category of wilful murder. From what sources will the Parquet and the advocate for the defence derive the arguments supporting their respective contentions? They will draw upon those sources which will be likely to influence the Court. The questions may therefore be put in this form, "Whence are the judges likely to derive the rules upon which they will base their decision?"

Clearly an advocate would be remiss if he did not endeavour to quote relevant decisions rendered by the Egyptian Courts supporting the contentions. And seeing that the Egyptian article is merely a reproduction of an article in the French Penal Code, he will do well to search out similar cases decided by the French Courts. He may also look up the opinions of the principal French jurists as contained in academic works on the Penal Law. He will hardly need to go further in so simple a matter as the one suggested; but one may remark, that when an Egyptian Court has to interpret provisions similar to those of other foreign countries, such as Belgium, Italy, and India, the decisions of the Courts of these countries and the opinions of their jurists will be relevant. For it is from such sources that the judges actually derive the ideas of the law upon which they base their decision.

Egyptian and foreign decisions and opinions may therefore be a source of Egyptian law. They are not authoritative—*i.e.*, the judges are not bound to accept the same views as those taken by any Court, however high, or any jurist, however eminent. But, in fact, they will refer to these decisions and opinions to obtain materials out of which to form their own conclusions.



In the use of decisions and opinions, however, the judges must exercise their own intelligence, according to their grasp of legal principle and their common sense. As we shall see later, there are occasions when the Courts are likely to find the solution of the problem of law in morality and equity, and in any case their interpretation of legislation will be influenced by such considerations.

We will now proceed to a discussion of these various sources of law in detail. But in this discussion, though primarily concerned with the sources from which the judges obtain the material for their decisions, it is desirable to bear in mind that these same sources have in varying degrees often been the historical origin of rules also clothed in a different form. Custom has been stereotyped in the form of statute law, and professional opinion has been adopted by the Courts and taken the form of decisions. Nor must we forget that custom and religion have been, and in some countries still are, a source in the first sense mentioned above—*i.e.*, it has been from them that the law has derived its obligatory character.

This being so, our discussion of sources will be of a three-fold character. We shall deal with these sources as creating the obligation to obey the law, as the historical origin of well-established rules, and as the raw material for the manufacture of judicial decisions. This must be remembered in the perusal of the present chapter.

Legislation is the principal source of modern law. That subject is, however, of so much importance as to merit treatment in a separate chapter. The sources which remain to be discussed are as follows :—

1. Custom.
2. Religion.
3. Precedent or Case Law.
4. Scientific Opinion.
5. Natural Law and Equity.

## § 2. CUSTOM.

In discussing the origin of rules of conduct mention has already been made of custom. The historical importance of custom as the precursor of state-enforced law has been illustrated and emphasized by many students of early forms and civilization. The first lesson which mankind had to learn was the necessity for the existence of rigid social rules, binding together the members of the community. The state in the modern sense did not exist, for it indeed is rather the consequence than the cause of the obedience which civilized man renders to law. The lesson of obedience was learnt by man under the tutelage of custom (*e*). What had been done in the past came to be regarded as a rule for the present (*f*). So strong indeed were the bonds which primitive society wove for itself in the shape of custom that they have been compared to the inherited habits of animals (*g*).

Frequently the customs of nations were regarded as religious in origin. This strengthened their hold on the

(*e*) Bagehot's "Physics and Politics," Chap. I.

(*f*) See Pollock, "Essays in Jurisprudence," pp. 55, 56, for an amusing comparison between the child mind and the mind of the primitive man to whom custom is law: "It is notorious that young children will appeal to precedent in support of their requests almost as soon as they can frame a coherent sentence. They will allege, if they can, the leave of a competent authority as already had, as by offering such a plea as 'Mamma lets me do it' to a father's prohibition of sports threatening danger to the child or destruction to the furniture. But if the authority referred to turns out (as generally happens) not to support the argument, the child's artless cunning falls back on the defence of bare precedent. 'One day I did it,' or words to that effect, are brought out with an air of perfect seriousness and confidence. . . . It may be suspected that we have in these involuntary revelations of infant logic the true primitive form of the universal argument of archaic conservatism. 'One day I did it' is the simple and undisguised statement of the mental process more plainly expressed by children of larger growth in the shape of 'our fathers have always done so.'"

(*g*) Lyell, "Asiatic Studies," 1st series, p. 201.

community and tended to intensify the conservative character which marks customary rules (*h*).

The conservatism of custom proved, and still proves, a great hindrance to the growth of law adequate to the needs of a changing people. To secure progressive civilization it was necessary that men, while retaining the love of order and respect for law which are the prime essentials of civilized life, should possess also the liberal spirit which admires originality and is prepared for innovation. "Progress is only possible in those happy cases where the force of legality has gone far enough to bind the nation together, but not far enough to kill out all varieties and destroy nature's perpetual tendency to change" (*i*). The concurrence of these conditions has not been common. Consequently the world is full of arrested civilizations, which have never been able to progress beyond a certain point at which the influence of tradition became stronger than the impulse to change. Progress beyond the customary stage is comparatively rare.

The history of the law of progressive nations is a story of continuous conflict between the conservatism inherent in legal institutions and the spirit of innovation prompted by the changing needs of the nation. The study of the methods which have been used to adapt the law to new requirements is one of engrossing interest. The two most powerful instruments in the case of Roman and English law have been the use of fictions and the theory of equity or natural law (*k*).

(*h*) "What is requisite (in primitive society) is a single government—call it Church or State as you like—regulating the whole of human life. No division of power is then endurable without danger—probably without destruction; the priest must not teach one thing and the king another, king must be priest and prophet king: the two must say the same because they are the same": Bagehot, *op. cit.*, p. 26.

For the relations of religion and early law, see more fully below, pp. 101 ff.

(*i*) Bagehot, *op. cit.*, p. 61.

(*k*) See note on "Legal Fictions" at the end of this section.

These have been associated with great freedom in the interpretation of the old texts and the application of a method of analogical reasoning which has gradually transformed the nature of the traditional rules.

It is not possible here to discuss in detail the long process of development which transformed bodies of archaic custom into modern systems of law. We need only note the scope which custom has played in the past as a direct source of legal or quasi-legal rules and its more limited importance at the present day (*l*).

In early times the sovereignty of custom was unchallenged, and even such bodies of early legislation as we possess seem to have been little more than a statement of pre-existing usage. The Roman Code of the XII. Tables, which from this point of view is indeed comparatively modern, was, for the most part, only a published statement of customary methods of procedure (*m*). But at the present day custom remains a direct source of law principally in communities of an unprogressive or barbaric character. European explorers and administrators in Equatorial Africa find there that tribal and religious custom supplies the people with rules occupying the place of law in the civilized community. But, indeed, we do not need to go far beyond the boundaries either of Egypt or of Palestine, if we need to go so far, to find communities within which custom occupies the place which law fills in the more advanced society. Among the natives of the Sudan, among the Arabs in Trans-Jordania custom is law. Even in India, save as regards persons who have adopted European

(*l*) It is interesting to remark that the Greek word *δίκη*, which in classical Greek means "right," meant originally custom, since in early times right was inferred from usage (cf. "Odyssey," IX. 215 ; XI. 218). This shows how closely the idea of custom and right are connected in the mind of man. The Mejele boldly lays down "Custom is Law"; "Common use has authority and each one ought to act and work according to it" (arts. 36, 37). " "

(*m*) Maine, "Ancient Law," p. 18.

habits of life and of thought, the sphere of custom in forming social and quasi-legal rules is very great. In Europe and Europeanized countries alone has custom been superseded so far as supersession is possible. There the centralized government occupies a commanding position as law-maker. The rules issued by the sovereign authority and the interpretation of those rules by the Courts have thus become the principal source of law for the community. The law-abiding sentiment of the people has become so strong as to be equal to the strain of drastic alterations in law effected by sovereign legislative bodies. Such a state of things is indicative of a high state of civilization and a strong sense of social unity.

The interest of custom as a source of law has consequently become mainly historical in character. The great modern systems of law had their origin for the most part in the customary rules of the past. The English Common Law was formerly described as the Customs of the Realm of England. The importance of custom in France and in Germany has already been mentioned in speaking of the influences which modified the application of the Roman Law in those countries.

In the actual practice of modern law custom, however, plays but little part in creating legal rules. There are, however, some interesting examples of its direct influence. As a source of rules of International Law it is of the greatest importance. In the absence of a supreme legislative authority the rules governing the relations of states *inter se* are necessarily largely determined by common practice. As a corollary from this we are not surprised to find that in the Ottoman Empire in general, and in Egypt in particular, custom has frequently determined the position of foreigners in relation to the state. The most striking example of this is the customary immunity from the territorial Criminal Courts which foreigners enjoy in Egypt. But it may be broadly stated that custom has been the principal source of the well

recognized rules governing jurisdiction in cases between foreigners of different nationality and between foreigners and natives (*n*).

Turning to the influence of custom upon the substantive private law we find the most striking example in the history of the mercantile law. Historically, mercantile law has for its origin the customs which merchants have observed in trade. This has been the direct origin of many very important commercial institutions, such, for example, as bills of exchange.

In the Middle Ages the "Law Merchant," as it was called, was almost international in character. It formed a body of rules founded on trade usages, frequently administered by other tribunals than those which administered the ordinary law of the land, and the international character of trade naturally resulted in a certain uniformity in the mercantile law in the various countries. The system had much to recommend it. It is principally in commerce that subjects of different states come into contact one with another, and the advantage of some sort of uniformity in the law of all states governing these commercial relations cannot be overestimated. Mercantile law has retained this international character to the present day (*o*).

Even now it is generally recognized that mercantile custom is a good source of law for merchants. In England this has been definitely laid down in recent decisions (*p*). In France also commercial usage has authority for those who

(*n*) See Pélissié du Rausas, "Le régime des Capitulations" (2nd ed.), Vol. I., pp. 398 ff., 413 ff.; Vol. II., p. 264. Compare the customary abolition in Egypt of the Ottoman rule that new Christian churches may not be built without Government authorization (*op. cit.*, Vol. II., pp. 186 ff.).

(*o*) See Mitchell, "The Law Merchant," Chap. I.; "Essays in Anglo-American Legal History," Vol. III., Essays, 47-58.

(*p*) Cf. *Bechuanaland Exploration Co. v. London Trading Bank*, [1898] 67 L. J. (Q. B.) 986; *Edelstein v. Schuler*, [1902] 71 L. J. (K. B.) 572; and see the judgment of Cockburn, C. J., in *Goodwin v. Roberts*, [1875] 44 L. J. (Exch.) 57.

enter into business relations in implied conformity with it. In this connection custom is rather used to explain and interpret the terms upon which the parties to some commercial document intended to contract than to establish a substantive rule of law. For purposes of interpretation of private documents custom is indeed much used in modern law. In commercial matters the meaning of words used is explained in its light, and rules established by usage are deemed to be tacitly adopted by the parties though not expressed by them in their contracts. In such cases custom forms a sort of conventional law. Where the parties might by express agreement have laid down a rule to govern their mutual relations, such a rule is in this way often tacitly added by the effect of a usage in reliance upon which they may be supposed to have contracted (q).

The scope of custom in reference to agricultural matters and the management of landed property is similar. In England the "custom of the country" is frequently quoted as impliedly establishing a rule in conformity with which the parties to an agricultural lease, for example, may be supposed to have contracted (r). The French Civil Code makes frequent reference to custom in this connection as

(q) Thaller, "Traité élémentaire de Droit Commercial," 4th ed., §§ 49-51. See the French Law of June 13, 1866, which contains an authoritative list of commercial customs which are to be applied in default of agreement to the contrary. Compare art. 44 of the *Mejelle*, "That which is known by custom among merchants has the same force as a private agreement." See also art. 40.

(r) Cf. *Wigglesworth v. Dallison*, 1 Smith's Leading Cases and notes. In the case of the peculiar English form of landholding known as "copyhold," which is a survival of the "villeinage" or unfree tenure of the Middle Ages, the "custom of the manor" also regulates the methods of alienation, the rights of succession, and the relations of the "lord of the manor" with his "tenants." In this connection custom has also an important effect in establishing servitudes such as rights of pasture held by the tenant of the manor upon the commons or wastes lying within it.

governing the relations of landowners (*s*). In Egypt the scope of custom seems to be similar. Thus article 30 of the Native Civil Code (*t*) states that servitudes are to be governed by the title whereby they are created and by local custom. Article 138 (*u*) directs that agreements shall be construed "according to the purpose which the parties appear to have had in view and the nature of the contract and also according to custom," and article 405 speaks of modes of proof sanctioned by custom which are to be admitted to establish the amount due. There are other examples (*x*). These articles indeed seem to give a somewhat wider sphere to custom in Egypt than in France. In particular the provision of article 405 (*y*) enables a judge to permit methods of proof not expressly sanctioned by the Code, and thus recognizes custom as an authoritative source of rules of procedure to this limited degree (*z*). And according to article 17 of Law 11 of 1912 creating Cantonal Courts, the judges of these Courts are directed to take account of local customs in the application of the law so far as these are not contrary to the principles of equity and natural law.

In Egyptian Commercial Law also custom has a recognized scope. It is referred to most freely for the purpose of the interpretation of contracts and commercial dealings in the manner explained above. The customs of the Port of Alexandria have, for example, been used to interpret a charterparty, and other examples may be found here and there in the reports of cases in the Mixed Courts (*a*).

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(*s*) F. C. C., arts. 645, 663, 671, 674.

(*t*) M. C. C., art. 51.

(*u*) M. C. C., art. 199.

(*x*) Cf. N. C. C., art. 363; M. C. C., art. 446.

(*y*) M. C. C., art. 493.

(*z*) See Halton, Vol. I., pp. 423, 424.

(*a*) B. L. J., V., 169; IX., 290; XV., 150; XVI., 101; XVII., 121. O. B., VI., No. 68. See generally upon this subject, Walton, "Obligations," Vol. I., pp. 377 ff.



The terms custom and usage are in English used almost interchangeably, the former being, however, that employed most frequently in legal language. It conveys possibly the idea of a more general adoption of some practice than is implied by the latter term. French lawyers, however, draw a distinction between "*la coutume*," and "*l'usage*" which should be noted. The definitions of the terms given by M. Thaller (b) will serve as an indication of the nature of this distinction. "*La coutume*," he says, "*est une règle de droit impérative et d'ordre public qui supplée à l'absence de la loi écrite ou qui même contrevient à une disposition de cette loi.*" "*L'usage*," on the other hand, "*est la clause tacite, sous entendue dans une convention, par laquelle les parties régulent leurs rapports suivant la pratique établie.*" Custom, therefore, is common practice regarded as the source of a rule of law, while the term usage is confined to such practice as gives rise to an implication that the parties intended their relations with one another to be governed by it and have relied upon this tacit understanding without expressing their intention in words. It will at once be noticed that it is usage in this sense and not custom to which reference is made in the various articles of the French and Egyptian Codes above cited (c), and in fact we find that the word "custom" in the English translation of these articles is invariably represented in the French text by the term "*usage*" (d).

What has been now said describes very briefly the scope of custom or usage as a direct source of law. The scope of custom as a source of law is not, however, really limited to

(b) *Op. cit.*, § 49.

(c) N. C. C., art. 405, seems to be an exception.

(d) The distinction between usage and custom and the place of the latter as a source of law in France has been the subject of much discussion in recent years. There is a very interesting chapter on the subject in Géný, "*Méthode d'interprétation en droit privé*," Pt. III., Chap. I., § 2. M. Géný's views are not, however, generally accepted. See also Capitaint, pp. 26 ff. and references there cited.

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the somewhat special cases just referred to. There can be little doubt that its influence is strong in the development of law, difficult as it may be to describe exactly how this influence makes itself felt. Law, as has been pointed out, rests as much upon the assent and obedience of the people as upon the will of the sovereign. Although rules may be imposed by authority they are only realized in practice, and their exact effect is sure to be modified by the social environment in which they are applied. Changes in that environment will consequently affect the real operation of the rules. Thus the changes which every society is sure to experience in its habits and modes of thought will react upon the law and by slow degrees alter its substance without necessarily altering its form. A law which really corresponds to the requirements of any society at a particular epoch must reflect the habits of that society either in its form or in its interpretation.

Indeed it has been maintained that custom, in the sense of the common practice of the community, is the sole source of modern law, apart from express legislation. When the Court is called upon to decide a case not provided for by statute, it can, it is said, find no other basis for its decision than the practice which men actually follow in daily life in settling similar affairs. And where there is no actual practice the judges must take as their guide the application to the case of the ideas of morality in vogue in the community (e). Such a view is certainly untrue as regards Egypt where recourse is far more likely to be made to French legal opinion for the solution of a case of first impression. It has more truth in application to "Common Law" countries and, indeed, emanates from America. As to this view, we may admit in the first place that a well-established customary

(e) "Law: Its Growth and Function," by Coolidge Carter (New York, 1907). Mr. Carter's ideas are criticized by Mr. Gray in Chap. XII. of the "Nature and Sources of the Law."

interpretation of the law will undoubtedly have great weight with the Courts. To break this by a contrary and unexpected decision is certainly undesirable, though it is sometimes done. And further, as we have already seen, the conditions and limits of legal liability, particularly contractual liability, must often be fixed by custom since it shows what the expectations of the parties really were or what they may be presumed to have expected. And that accepted moral standards, since they are likely to be shared by the judges, will furnish the criteria by which they will judge men's conduct and admit legal liability may also be granted. But remark that the application by deductive reasoning of general principles of morality is not the same thing as the adoption of general practice in some specific point as a rule of law. Thus if a Court is called upon to decide whether any legal liability arises for damage done to a neighbour's trees by a proper cutting without permission of branches overhanging the defendant's garden, it might reasonably be influenced by the existence of a well-established practice to cut overhanging branches in this way. And in the absence of such established practice, it might conceivably ask itself whether the act was consistent with the general ideas of the community as to the limits of interference with other people's property, though in either case it would undoubtedly try to present its decision as a deduction from legal principles and not as the adoption of a customary understanding or as a conclusion drawn from considerations of practical morality (*f*). But while an influence exerted by an established practice to cut branches would be the influence of a true custom, the influence of general moral notions as to the difference between "mine" and "thine" would not be of this character.

(*f*) Cf. *Lemmon v. Webb*, [1895] 64 L. J. (Ch.) 205.

## LEGAL FICTIONS.

Used in a broad sense a fiction is a statement which is assumed to be true although its untruth is notorious. The importance of fictions both in the history and in the actual administration of the law has been and is considerable. Their use has often enabled judges to extend the law to meet new needs. In Roman Law, for example, the Prætor made use of fictions to extend the protection of the law to persons whom he wished to bring under that protection, but who would not according to the strict rules of law have been able to claim it. He did this by allowing them to base their action on the assumption that they did fall within a class of persons entitled to sue and forbidding the defendant to deny the truth of the assumption. Thus in the case of succession to property, when the Prætor wished to give a right to sue for and recover property belonging to the inheritance to a person who was not entitled to succeed according to the rules of the old Roman Civil Law, he did so by permitting this person to sue on the assumption that he was heir according to the Civil Law, and he forbade the defendant to set up as a defence an allegation that the plaintiff was not in fact civil heir (see Gaius, IV., § 34).

To bring home to the reader the nature and use of this sort of fiction, one might imagine a Mixed Court of an earlier epoch enlarging its jurisdiction by a fictitious attribution of nationality. Suppose that the Mixed, the Native and the Consular Courts were each employed in seeking to enlarge their jurisdiction, and were not liable to be controlled in their proceedings by an active legislative authority, or the scrutiny of Consuls General. If Ahmed, a native subject, sues Zaky, also a native subject, for debt before the Mixed Courts, Zaky will plead to the jurisdiction and the Court will declare itself incompetent. But if Ahmed had been a French subject (*e.g.*, an Algerian), the Mixed Courts would then have jurisdiction. Suppose that Ahmed was permitted to allege that he was a French citizen and that the Courts would not allow Zaky to traverse this allegation. This would seem to us a very strange proceeding (*g*), but fictions of a similar description were in the past actually used in England to enlarge the jurisdiction of the Courts.

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(*g*) The jurisdiction of the Mixed Courts was, however, actually enlarged by the effect of fictitious assignments of debts to foreigners and by fictitious arrestments. See Jud. Adviser's Rep., 1899, p. 18. Scott, "Law affecting foreigners in Egypt," p. 222. But these were not "legal fictions" in the sense of the text. The assignment was simulated but it did really exist. It was not merely feigned by the Court to exist.

Indeed in English law fictions have been largely resorted to for many purposes, but the examples are too complicated to admit of summary statement. As in Rome, they were generally used to avoid the effect of some rigid rule, and the method employed was to assume that the requirements of the law had been complied with, though this was contrary to fact. They generally occurred in connection with procedure, the proceedings being based, as in the Roman example just given, upon assumptions untrue in fact, but which the other party was not permitted to traverse.

These procedural fictions have vanished with the introduction of other and simpler methods of law-making; but fictions of a different kind are by no means uncommon in modern law. An assumption is made that some particular relation between men is identical in character with a relation in reality of a different character; thus adoption is based upon a fiction of paternity, and the ownership of property by corporations upon a fiction of corporate personality. In each of these cases the purpose of the fiction is to assimilate the exceptional to the well known. Natural paternity is a common and well understood legal relation, and to assimilate adoption to paternity is to facilitate the regulation of the adoptive relationship by applying rules already in existence for the natural relationship which it imitates (*h*).

### § 3. RELIGION.

The connection between religion and law has already been touched upon in speaking of custom. That belief in the supernatural has had an immense influence in the history of law is certain. Indeed it would appear that religion, or rather superstition, provided in early times and still provides in barbaric society the principal motive for the observance of social rules. Reference has already been made to this, but further examples may here be given. Sir James Frazer in his book above mentioned lays down the proposition that "among certain races and at certain times superstition has strengthened

(*h*) See Gray, *op. cit.*, §§ 74 ff. Mr. Gray, following Ihering, terms the older kind of fictions "historic fictions." They were "devices for adding new law to old without changing the form of the old law." The modern kind of fiction he calls "dogmatic fictions." These are brought in "to arrange recognized and established doctrines under the most convenient forms."

(a) the respect for government ; (b) the respect for private property ; (c) the respect for marriage ; and (d) the respect for human life (i). He gives copious illustrations under each of these heads. The method by which superstition has produced these effects has been by the creation of a fear in the minds of the people that if they do certain acts they will be visited by supernatural penalties. Let us take for example the case of private property.- Savages believe that it is possible to bring evil upon a person who interferes with their private property by placing the property under a "taboo." Thus among certain peoples of the island of Celebes the fruit is protected by charms attached to the trees. "The charms consist of the leaves of certain plants or parts of an animal tied up in leaves. Before the owner fastens one of these amulets to the tree he says : ' O charm, if any man will take of these fruits make him sick.' And the people in general believe that sickness will overtake the thief who disregards the taboo and steals the fruit." Or again, "The Annamites in the interior of Tonquin believe that the ghosts of young girls who have been buried in a corner of their dwelling act as a vigilant police ; if thieves have made their way into the house and are preparing to depart with their booty they hear the voice of a ghost enumerating the things on which they have laid their hands, and in a panic they drop them and take to flight." The Wanka of East Africa "hang painted calabashes from the baobab at their hut doors to keep away thieves ; shells, dolls, eggs scratched over with Arabic characters are placed about their plantations and in their fruit trees, and they

(i) "Psyche's Task" (2nd ed.), p. 4. The illustrations given below are mentioned on pp. 29, 33, and 38 of this book. Compare "Taboo and the Perils of the Soul," p. 219 ; "Belief in Immortality among the Aborigines of Australia, &c.," pp. 175, 391, where mention is made of the part played by ghosts in maintaining order in early society. The guilty feeling which prompts a man to glance round when he is doing a wrong act is perhaps a survival of this.

believe that death would overtake the thief who should disregard them." Sir J. Frazer's examples are taken from many different parts of the world and could also, I am given to understand, be augmented by instances from the beliefs of the ignorant classes in Egypt. Survivals of such superstitious practices may easily be found in Europe also.

Advancing upwards in the scale of civilization we find that belief in the divine origin of customary rules lent to them additional authority among many early peoples, and as a consequence there existed a close connection between law and religion. Thus in early Rome the pontiffs were the repositories of the law as they were the representatives of the religion. "Their science of law was closely bound up with their science of religion and astronomy. Theirs was the knowledge of the *jus sacrum* and the calendar, they alone could tell the *dies fasti* and *nefasti*, i.e., the days on which an action at law might or might not be commenced. It was a consequence of their functions as consulting assessors in the law courts that the knowledge, control, and development of the formulæ relating to actions and to juristic acts came to rest entirely with them" (k).

The development of the law at Rome, however, early passed from spiritual to lay hands, and Roman Law in its later development was not the law of a people who held a particular religion, but the law of the members of a state. With this view of law must be contrasted that which is presented by two of the great religions of the East, Mohammedanism and Hinduism, to which may be added Judaism. Law and religion are interwoven one with another in each of these systems. In Egypt it is the religious conception of law as found in the Mohammedan Faith which presents most interest. Mohammedan Law is founded upon the revelations of the Prophet as recorded in the Koran and the traditions (Sunnat)

(k) Sohm, "Institutes of Roman Law," § 15. Cf. Walton, "Introduction to Roman Law," p. 263.

which have been handed down with regard to his spoken words and action on particular occasions. To these may be added the *Ijmaa* (concordance among the followers) and, for its later developments, the exercise of "*Kyas*" (private judgment and use of analogy) on the part of the great Expounders of the Law (*l*). In effect, it has as its origin the divinely inspired words of the Prophet, his customs and daily practices, and the decisions and explanations of his leading disciples.

Whatever the later application of the Sacred Law may be, there can be no question that the rules laid down by the Prophet were intended by him for the guidance of his followers, and as such their observance formed an essential part of religious duty. The Law includes, of course, the regulation of what may be called purely religious rites and ceremonies, such as prayers, fasting, pilgrimage, and the like. With these, however, we are not concerned, as they fall altogether outside the scope of the Positive Law. The essential point to notice in the present connection is that it also includes rules dealing with marriage, inheritance, gifts, contracts, and the punishment of crime, which from a European point of view fall outside the scope of religion.

For in Christendom law does not find its source in religion. The spread of Christianity through the Roman Empire did not, therefore, disturb the existing law, except so far as its moral influence tended to affect legislation. The Christian has not as such a peculiar law, for the Founder of the Christian Faith did not, like the Prophet, establish a state and give laws to His adherents. He confined Himself to laying down moral principles and teaching spiritual doctrines. Thus there does not exist any body of Christian law in the same

(*l*) Syed Amir Aly, "*Mohammedan Law*," I., p. 9. For the sources of Hindu Law, see Markby, "*Introduction to Hindu and Mohammedan Law*," Chap. I., and also Maine, "*Early Law and Custom*," Chap. I.; Lee, "*Historical Jurisprudence*," Chap. V.



sense that there exists a law for Mohammedans of a professedly religious origin. The Christian states of modern Europe have inherited the traditions of the Roman Empire in this respect. The law in these countries is secular ; its authority rests upon the state power and it is independent of religious obligation.

But although no body of Christian Law exists, the process of separation of the spiritual from the secular power and of the ecclesiastic from the lawyer has in Europe been long and toilsome.

The break-up of the Roman Empire did not impair but rather enlarged the importance and authority of the Christian Church. This authority came gradually to be concentrated at Rome, for the Bishop of Rome, known as the Pope, obtained the Primacy of the Western (Catholic) Church. The power of the Roman Catholic Church steadily increased as the centuries passed. Its admirable organization and its spiritual claims enabled it to encroach upon the secular powers of political sovereigns and to exercise over their subjects an authority of an extensive character. Thus in mediæval Europe the law of the Church known as the Canon Law governed many questions now generally regarded as purely or mainly secular. The Canon Law is the body of law regulating the Constitution and action of the Catholic Church. So far as it relates to religious rites and ceremonies, the powers and duties of the ecclesiastical functionaries, and other matters of a purely religious character, it is not of general interest. But it is desirable to remark that relations between men not essentially religious in character fell or were professed to fall within the scope of the Canon Law and within the jurisdiction of the Church Courts which administered it.

The most important and most lasting example of this is furnished by the institution of marriage.

Christians generally regard marriage as having a certain religious character, and this view is due to its being ranked

by the Church as a sacrament. The Canon Law regulated the degrees within which marriage was permissible, the conditions required for its valid celebration, and the conditions under which divorce could be obtained. The complete breaking of the connubial tie by divorce is indeed contrary to Canon Law, although special dispensations can be obtained from the Pope (*m*).

The Church claimed and obtained exclusive jurisdiction in matters of marriage, and in the Middle Ages the Canon Law was strictly applied. But the steady growth of the Royal power, which was generally hostile to the claims of the Church in matters of jurisdiction, resulted in the gradual transfer of matrimonial causes to the Royal Courts. In France the contest on this point was long and tedious, but the transfer had been completed by the eighteenth century (*n*). But this did not involve the abandonment of the rules of Canon Law, for the law administered by the Royal Courts was based as a whole upon that formerly applied in the Church Courts. In more modern times, indeed, many departures from it have been made. It is to-day a fixed principle of French law that marriage is only a civil contract and divorces are now freely granted by the secular Courts. Yet both in France and elsewhere in Europe the law of marriage has not in principle departed from the conceptions consecrated by Church doctrine (*o*).

(*m*) For an account of the growth of the Canon Law of marriage see Smith, "Church and State in the Middle Ages," Lect. II. This writer points out that the Canon Law on this subject was an attempt to weld into one rules upon marriage derived from many sources, by no means all religious in character. It was necessary to take into account the rules of Roman law practised in the South and those of Teutonic custom followed in the North. Thus the Canon Law really represents a compromise which the Church enforced upon a semi-barbarian society by which it sought to restrain the sexual laxity of preceding ages. Much the same view has been put forward as to the character of the Mohammedan marriage law.

(*n*) Viollet, "Histoire du Droit Civil français," pp. 433-439.

(*o*) In *Hyde v. Hyde*, L. R. 1 P. D. 130, the English Court of

The contest in France has been repeated in other Catholic countries in which secular feeling has struggled against the claim of the Church to exclusive control over marriage and divorce. In Italy, for example, this question was bitterly contested during the last century, and the final victory has been achieved by those who claim that a civil marriage is fully binding.

England has followed a peculiar line of her own in the matter. In that country the Ecclesiastical Courts early obtained jurisdiction over questions of marriage and of inheritance to goods, whether under a will or on an intestacy (*p*). And this jurisdiction continued after the Reformation of the sixteenth century which resulted in the separation of the Anglican Church from that of Rome. This separation subjected the Church in England to state control, and the bitterness of the conflict between state and Church on the Continent of Europe was thus avoided. It was not, indeed, until 1857 that the ecclesiastical jurisdiction in these matters was abolished and their powers transferred to a new secular Court. But the change of jurisdiction has been made without any radical change in the law, except that divorce forbidden by Canon Law has been permitted in certain cases. Civil marriage has been, indeed, introduced, but a marriage according to religious forms is equally binding, the choice between the two being left to the contracting parties. But it is to

Probate and Divorce refused to recognize the existence of a Mormon (polygamous) marriage, it being "inconsistent with marriage as understood in Christendom that the husband should have more than one wife." Divorce was long prohibited in Europe on religious grounds, and in certain Catholic countries it cannot even now be obtained under the law. Alterations in the law of marriage have been a frequent cause of conflict between the secular and ecclesiastical authorities. Quite recently in England an Act which permitted marriage with a deceased wife's sister has been bitterly attacked by some as a breach of religious law.

(*p*) Holdsworth, "History of English Law," I., pp. 389-401.

the secular Courts that the parties must go in order that the question of the validity of the marriage may be determined.

Marriage is only one example of the jurisdiction claimed by the Church over laymen. Dower, Filiation, Contract, besides the testamentary causes just mentioned, have at different times and places and to a greater or less extent fallen within its scope. Each of these has consequently furnished a cause of conflict between secular and spiritual authorities out of which the secular authorities have finally emerged victorious. But although these matters are now recognized as properly belonging to the secular Courts, yet the law administered therein is in many cases still based upon the rules derived from the Canon Law (*q*).

In spite, however, of the importance of the Canon Law and its wide application in the past it may yet be safely asserted that in Christendom the law is in principle secular. Such exceptions as have existed formerly or still exist to-day have arisen not from the existence of any specifically religious law which all Christians are bound to obey, but from the growth of the ecclesiastical power which enabled it to extend its jurisdiction at the cost of the state. The gravest claims made by the Church in the Middle Ages were those to exclusive jurisdiction over the crimes of the clergy. Here the challenge to the authority of the state was obvious, the question being raised as to whether the officers of the Church were as such removed from the temporal jurisdiction. The contest was one rather between rival jurisdictions than between a secular and a religious law. Indeed the Canon Law actually administered by the Church Courts is not as a whole of religious origin. Although certain of its precepts are supposed to have

(*q*) See Esmein, "*Histoire du Droit français*," pp. 649-653; and see, for a general sketch of the origins of the Canon Law and the existing state of ecclesiastical jurisdiction in Europe, Lee, "*Historical Jurisprudence*," Chap. XII.

for their authority the words of Christ (*r*), the law as a whole was made up of Church custom and Papal legislation. Much of it was indeed borrowed from the Roman Law.

This is the case to-day in countries, such as Turkey and Egypt, in which Christian ecclesiastical authorities enjoy wide jurisdiction in legal matters over the affairs of the members of their respective communities. The law of inheritance adopted by the Orthodox Eastern Church is Roman. It is based on the 118th Novel of the Emperor Justinian. And the willingness of Christians to have recourse to the Mohammedan Law which is remarked in Egypt is proof itself of the feebleness of any religious sentiment attaching to the provisions of the law which properly speaking is that of their own community (*s*). These points deserve attention in order that the contrast between the Christian and Mohammedan religions in this respect may be fully appreciated. To sum them up, it may be asserted that while Mohammedan Law has its ultimate origin in divine revelation and is as such essentially a body of religious law, the law of Christendom is secular and dependent for its contents upon popular will and the sovereign power. So far as law of a religious nature exists in Christendom it is due mainly to the pretensions of a powerful Church seeking to assert an authority independent of the state.

#### § 4. PRECEDENT OR CASE LAW.

Sir Henry Maine has an interesting passage in which he describes the effect upon Indian local customs of the establishment by the English of regular Courts of justice in India. The customs which had been previously collected from the

(*r*) As for example in the case of the prohibition of divorce, for which see S. Matthew, chap. v., verse 32; S. Mark, chap. x., verse 11. For other examples see Viollet, *op. cit.*, pp. 34-37.

(*s*) Sidarouss Bey, "Les Patriarchats," pp. 152, 312-313.

testimony of village elders were now ascertained by enquiry in the Law Court which enforced them. And it is natural that henceforth the decisions of the Courts should be the best evidence of the existence of the custom (*t*).

Somewhat the same process has taken place in England itself. The custom of the realm interpreted by judges has become the common law. And this common law is to be found in the decisions of the judges as to what is or is not law in England.

Thus a regard for custom naturally gives rise at a later stage in legal growth to a regard for precedent. It is in England particularly, and in countries such as the United States of America, where the English Common Law has been received, that precedent plays the most important part in law-making.

The English theory merits, therefore, special attention. It is well, however, in the first place to note the process by which the establishment of regular Courts staffed by professional judges results not unnaturally in attention being paid to previous decisions and the growth of a body of Case Law.

In whatever form the laws of a country may be, and however complete the authorities, yet questions which involve some difficulty continually arise before the Courts. Doubt may arise as to the true interpretation of a section of an Act of Parliament (England) or an article of a Code or a Decree (Egypt), or the questions may concern some point not dealt with by any provision of statute law.

In any case, a decision must be given. The French Civil Code (art. 4) in fact expressly forbids judges to decline to

(*t*) "Village Communities," 7th ed., pp. 71-73. So also the *θεμματα* of the Homeric kings, though they were believed to be dictated to the kings by the Gods, were probably based really on pre-existing custom ("Early Law and Custom," 1st ed., p. 35). But in "Ancient Law," 6th ed., p. 5, Maine appears to take another, though not wholly inconsistent view.

adjudicate *sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi*. It is not unnatural that a judge when called upon to decide upon a difficult question of interpretation or to apply a rule of law to a new case should consult the decisions of previous judges upon similar points. And further, if in case after case judges have tended to adopt one particular interpretation or to follow one particular rule, this series of decisions in its favour will come to be regarded as having the force of law, and the view thus sanctioned by the Courts will be binding for the future. So even French authors say "*La jurisprudence fait loi*."

This result is likely to follow where the judges are themselves professional men and there exists no other authority of equal consequence in interpreting the law. It leads, of course, to the reporting of the decisions of the judges and thus naturally tends to increase their influence. In England for many centuries the judges have occupied a position of great independence and great authority. They have been recognized as the repositories of the Common Law and their decisions are its authoritative interpretation.

The English theory may be stated briefly as follows :—

A judge, when called upon to decide a case, is obliged to follow the previous decisions which bear upon the matter in issue. He must seek to extract from the previous decisions by which he is bound the rule upon which the decisions proceeded, and he must apply that rule to the case before him. But he is not bound by rules laid down in the course of previous judgments except so far as they were really necessary for the decisions. It is only the rules upon which the decisions actually depended by which he is bound. It is possible that he may find in the facts of the case before him some facts which serve to distinguish it from previous similar cases and in his opinion take the case before him out of the operation of the rule involved in the former decisions. He must weigh all the cases which seem to have some bearing upon the case

before him, and the rule which he eventually applies will thenceforth have the authority attaching to his decisions, so far as it is in fact required for the decision of the case. Of course, while appearing to follow rules involved in previous decisions he is frequently in fact building up new law. Little by little the results of old rules are worked out, and their operation is extended or restricted as cases arise which call for their application. So an English judge makes law in applying it, whence his work has obtained the name of Judicial Legislation. The law so made, since it is made in close connection with facts, is likely to be pre-eminently practical, though accident may cause its development to be unequal.

The English judge is not, however, bound equally by all previous decisions. The decisions of inferior Courts are not absolutely binding upon Courts of co-ordinate authority, but in the absence of strong reason they should be followed. The decisions of the Court of Appeal are generally binding upon the Appellate Court itself and upon all Courts below. Those of the House of Lords are binding on all Courts in the United Kingdom and upon the House itself.

But the importance of Precedent or Case Law in England cannot be rightly judged by a statement of the actual authority of each Court. For centuries it has been the habit of English lawyers to look to Precedent and to Precedent alone for the rule to be applied in every case coming up for trial. In the absence of legislative authority the English judge will apply no rule for which he cannot quote authority in the reports. He seeks the rule through an analysis of the cases. The opinions of eminent jurists may assist him in arriving at a decision as to the true meaning of the cases ; so also may the decisions of judges in other Common Law countries, such as the United States of America, but he rests his decision finally upon some case or group of cases which in his opinion support the rule which he applies.



During the seventeenth and eighteenth centuries the development of English law was effected principally through judicial decision creating a body of Case Law. During the nineteenth century vast changes were made by legislation, but the deference paid to Precedent in England remains undiminished (*u*). And although the English law is now far more than formerly to be found in statutes (laws made by Parliament), yet in the interpretation of the statutes as in the declaration of the law so far as it is not contained in statutes, the English habit of treating judicial decision as establishing a rule still maintains.

In France, on the other hand, this habit of deference to previously decided cases has not grown up. The French recognize the importance of Case Law (*la jurisprudence*) (*x*) as an instrument for the development of the law, but in France the influence of "*la jurisprudence*" has often conflicted with another current of authority, namely, the opinion of learned lawyers not on the bench (*la doctrine*). The judges are not allowed to develop principles of law in their judgments. They are expected to decide simply the case before them. "Their judgments can only have a relative authority limited to the matter before them. They are concrete decisions, obligatory only for the parties to the suit."

The decision of the Court in the case in issue is binding upon the parties, if at least the decision is that of the final

(*u*) A brief note upon the English Law Reports will be found at the end of this section (Note A). There is an admirable account of the English theory in Dicey's "Law and Opinion in England," Note IV. (pp. 481 ff.). See also Gray, "Nature and Sources of the Law," Chap. IX., where the view that English judges make law and do not merely declare it is strongly argued.

(*x*) "*La jurisprudence*" is defined in French as "the manner in which laws are interpreted by the Courts" (Planiol, I., § 122). This specialized meaning seems to be derived from the older and broader use of the term to denote a whole body of law. It is the contrast between "*la jurisprudence*" and "*la doctrine*" which gives to the French use its peculiar import.

Court of Appeal or if there is no appeal or the time for appeal has run out. "*Interest reipublice ut sit finis litium.*" (It is a matter of public interest that litigation should have an appointed end.) But this gives no authority to the decision as a precedent. To serve as a precedent it is necessary that the decision should be treated as the application of a principle which having been adopted in one case ought to be adopted in future cases in which the same question of law is raised. This is the English and American view. But it has never been adopted in France or in Continental countries generally. Indeed in France the decisions of the Superior Courts do not always bind the Inferior Courts even in the same case. If a Court of Appeal in France decides a point of law and a "*pourvoi*" is presented to the Court of Cassation against the decision, the decision of the Court of Cassation does not bind the Court of Appeal to which the case is remitted for trial if the "*pourvoi*" is admitted. If, however, a second "*pourvoi*" is presented in the same case the decision in Cassation will then be made "*toutes chambres réunies,*" i.e., the three divisions (*Chambre des Requêtes, Chambre Civile, Chambre Criminelle*) sitting together. This second decision is binding upon the Court of Appeal to which the case is now remitted (y). But it is binding for that case only. If the same point is raised the next day before the same Court in another case, the Court may decline to follow the view taken by the Court of Cassation in the previous case. Probably it will not do

(y) Loi, 1<sup>er</sup> avril, 1837. In Egypt a "*pourvoi en cassation*" can be brought from the Native Courts in criminal matters only, and except when the "*pourvoi*" is allowed on the ground of substantial nullity of procedure the case is not sent back for trial, but is finally decided by the Court of Cassation. In any case the Court of Cassation finally decides the matter when there is a second "*pourvoi*" (N. C. Cr. Pro., arts. 229, 232). For the Mixed Courts, see M. C. Cr. Pro., arts. 250, 252. There is no Mixed Court of Cassation in civil and commercial matters. As to the desirability of the institution of such a court, see Pélassié du Rausas, *Le Régime des Capitulations*, Vol. II., pp. 319 ff.

this, because the parties could, by presenting a "*pourvoi*," get the decision quashed. But it would not be acting illegally in doing so. And it has sometimes happened that a difference in the jurisprudence of the Court of Cassation and Courts of Appeal has lasted a long time (z).

This state of affairs seems very strange to an English lawyer, but the English rule must seem equally strange to Continental jurists. How did the difference arise, for the English Courts were not always bound by Precedent? One reason at least is no doubt to be found in the superior respect paid to judges in England. In England and Scotland judges are few in number, highly paid, and chosen from the most successful and learned members of the profession. In the great majority of cases the judges of the English Supreme Court, which includes both Courts of First Instance and the Courts of Appeal, are men in later middle life who after an active and lucrative life at the Bar are prepared, sometimes at a pecuniary sacrifice, to accept a seat on the Bench in order to free themselves from the harassing labours of practice.

This close connection between the Bar and the Bench is moreover likely to result in a high regard paid by the practising lawyers to the decisions of the judges. The judges are men well known for many years to the members of the Bar. They have worked together at the Bar, and elevation to the Bench does not destroy the sentiment of solidarity which has grown up between them. Many other causes have assisted in giving authority to judicial decisions as expositions of the law. English law as a whole is original, *i.e.*, it has developed in England not as an adaptation of an older system to present needs, but as an indigenous growth. It is the product of the practising lawyers in London. The Universities in England did not till recently teach English law. So far as English law

(z) Cf. the variation in the jurisprudence upon the interpretation of art. 334 of the French Penal Code.

was taught at all, it was taught in London by lawyers there. Its teaching like its practice was concentrated in London and was closely connected with the London Courts. And it was taught from a practical standpoint, as a system of practice, not as a system of legal thought. To what other authorities could the lawyers refer than to the practice of the Courts? And the Courts for the English lawyer meant the Courts in London and those only. The advocate is sure to search for some written statement of the law upon which to found his argument. But the English Common Law was not embodied in legislation, and references to Roman law were almost useless since that law was not recognized as having any authority in England. A few well-known legal treatises were available, but the previous decisions of the Courts afforded to the advocate the most readily available foundations for argument. "The book" which for a French lawyer most naturally meant the Roman Digest and its commentators, came to mean in England, the books of Reports of Cases. And an English lawyer fortified his argument by referring to the "rule" laid down in some previous cases as governing the decision, when the French lawyer would refer to the rules laid down by Roman jurists, or in later days to the rules of the codified law.

The fact that the works of Roman jurists were quotable authorities in France prevented the French lawyers from experiencing the need for other written statements of the law which has been in great part the cause of the importance of Precedent in England. Even the customary law of the various French towns was also early reduced to an authoritative written form. And to some extent before and to a still greater extent since the French Revolution French law has very largely been set forth in Codes of Law which contain a written statement by the legislator of the rules to be applied in the Courts. Incomplete as these Codes are, yet they are still to be treated as the only authoritative law, and judicial

interpretations and extensions of the rules there laid down are looked on as expressions of judicial opinion for the purpose of the case in issue, and not as a guide or direction to other judges before whom the same legal problem may be subsequently brought. Moreover, the influence of French jurisprudence is seriously affected by the methods in which appointments to the Bench are made in France. In that country the judges are numerous and ill-paid in comparison with those in England. They are not chosen from the practising Bar, and the sentiment of solidarity between Bench and Bar so striking in England does not exist in France. The French judges are judges by profession, and are often quite young at the time of their first appointment to the lower grades of their calling. And legal business is not so centralized in France as in England. Paris does not occupy so predominant a place in the French legal world as does London in the English system. Courts of Appeal are scattered over the country, and this no doubt has also militated against the growth of traditional respect for the decisions of any one Court (*a*).

(*a*) The distinction between Anglo-American and Continental notions of the importance of the "case" is so well put by Professor Redlich that I am tempted to quote the whole passage:

"To the German and Frenchman of our time, therefore, the law always appears in popular thought as the abstract rule, as the general principle, to which all individual relationships of the citizen are *a priori* and for its own sake subordinated. To the Englishman and the American, on the other hand, the law appears rather as the single case of law, as the single subjective suit, conducted by the regular judge and depending only upon his 'finding of the law.' The task of the European judge is to find which of the rules and principles of law that are contained in the system of law governs the state of facts in question. Here, however, in the common law country, the law appears in the national thought as a quality which to a certain extent comes of itself to men and to the relations which bind men together; as something that is always there, and for that reason is known and understood by every one of the people themselves. When, accordingly in the single case, the rights of a fellow countryman come into question, it is the

Whatever may be the reasons, however, there can be no doubt of the fact that the French judiciary do not attract the same veneration as a legal authority which is accorded to the judges of the Supreme Court in England and that the views of non-practising lawyers who occupy chairs in the many excellent French law schools vie with them in authority. But although the authority of judicial decisions in France cannot be compared to that which is given them in England, the jurisprudence has secured a very important place among the influences which mould the development of the law, and its importance has been steadily growing during the last fifty years. Particular respect is naturally paid to the decisions of the Court of Cassation, the jurisprudence of which tends to fix the varying jurisprudence of the lower Courts. The members of this Court have enjoyed great experience as judges, and it is natural that their opinions should be highly esteemed (b).

judges' duty to extract from the existing state of facts the law which is already contained in it, and to declare in his decision, how, from the point of view of the law, the human relationships involved ought to have been or ought now to be ordered, in which task the only guide he can use is not an abstract norm or principle, but only the decisions of other judges in similar cases. It is true that the decision gives for the single case a rule which rests upon a legal principle. This rule, this principle, however, does not exist as a general and abstract norm, but appears only in the single case, and to a certain extent exists only for the need of the parties involved in this particular decision, even though as a precedent, it possesses a certain directive force for future cases of the same or similar nature." ("The Case Method in American Law Schools," pp. 36-37.)

(b) The best reputed collections of French decisions date from the period of the Revolution, but it was not until about 1830 that they took their present form. A brief account of the principal of these will be found in a note at the end of this section (Note B). The "*Livre du Centenaire*" contains a deeply interesting sketch by M. Meynial of the history of these collections (Vol. I., pp. 175 *et seq.*). There is some account of the French theory of Precedent and a comparison with that of England in Mr. Walton's "*Scope and Interpretation of the Civil Code of Lower Canada*," pp. 107-124.

Some of the most eminent French legal writers have insisted upon the value of Case Law as the expression of the practical needs of the people, and a reconciliation is gradually being effected between the academic doctrine, which will be discussed in the next section, and the current of judicial authority.

This tendency to reconciliation is indeed most marked. In reference to it M. Saleilles, one of the most able of modern French lawyers, has said: "It cannot indeed be affirmed that the jurisprudence is strictly speaking an immediate source of law. Yet it is to this that things are tending. To determine historically the results obtained by the jurisprudence and to make these part of the regular course of legal studies is in fact equivalent to a recognition of judicial decision as a normal element in the law of the country. Such a manual as that of M. Planiol is evidence of the fact, and we may judge by the success which his treatise has secured how eagerly the French legal world desires to see the end of the abnormal antagonism between theory and practice, between the law which is taught and the law which is applied" (c).

And it should be remarked that as regards considerable portions of the law there does not exist any legislation even in France. Thus there are in the French Codes very few rules with reference to the law governing Civil Wrongs, and even fewer as to the very difficult problems which rise when the circumstances make it desirable to apply foreign rules of law, and not French law to the determination of a case (Private International Law). Consequently reference to the "jurisprudence" of the French Courts is very necessary as to such matters if we are to find out what rules are actually applied to their solution in France.

But however great the influence of the jurisprudence may be in French practice, it must not be forgotten that it has not

(c) "Livres du Centenaire," I., p. 127.

any binding authority. And this is true also in Egypt where the French system also prevails.

An Egyptian lawyer citing an Egyptian case can therefore only present it as a specimen of correct reasoning, not as an authority binding the Court. No doubt, particularly if the case was decided by a higher Court, the decision will derive a certain influence from the character of the judges who decided it. "If the judges of the Court of Appeal thought so," a Summary Judge may say, "surely I cannot go far wrong in following their views, even though the contrary opinion does appear plausible." And judges will no doubt be influenced also by anxiety not to disturb the previous jurisprudence, and thus render the law more uncertain. But the principal ground upon which an Egyptian judge will follow a previous decision is his agreement with the reasoning upon which this decision rests. There cannot be in Egypt such a thing as mechanical citation of cases. It is not primarily because the same point of law has been previously decided in a certain sense, but because the reasoning upon which this decision rested commends itself to the Court trying the second case, that the same conclusion will be arrived at. This is not always so in England. A judge may confess himself in disagreement with the previous decision and yet hold himself bound to follow it.

In Egypt the Codes are so new and law reporting in so elementary a stage that native jurisprudence counts for little. The jurisprudence of the Mixed Courts is more important than is that of the Native Courts. An account of the principal collections of each of these will be found in a note at the end of this section. The historical connection existing between the Egyptian and the French Codes renders reference to the French collections easy and useful, and such reference is freely made.



## NOTE A.—ENGLISH LAW REPORTS.

The Reports of cases decided in the English Courts commenced in the thirteenth century. They were written in Norman-French, which was the living language of the Courts at the time. This usage continued until the close of the seventeenth century, though French had then long ceased to be used in the Courts, and the language of the later Reports is an extraordinary jumble of degenerate French with interspersed English words.

From the sixteenth century onwards there exists a fairly continuous series of Reports which much improved in completeness and accuracy in the latter half of the eighteenth century. The Reports of this epoch were compiled by barristers attending the Courts and are quoted under the name of the Reporter. They are very numerous, and the multitude of different names give a cryptic character to the abbreviated references. During the whole of that period there existed a number of different and independent Courts, and each of these had its own succession of reporters. The principal of these courts were (a) the three Common Law Courts, namely, the Court of King's Bench, the Court of Common Pleas, and the Court of Exchequer; (b) the House of Lords, which was the Supreme Court of Appeal; (c) the Court of Chancery; (d) the Court of Admiralty; (e) the Ecclesiastical Courts.

Each of these Courts had its own succession of reporters. As examples we may take two or three series of Reports of the Court of King's Bench. Between 1801 and 1830 cases in this Court were reported in four separate series known as East (16 vols.), Maule and Selwyn (6 vols.), Barnewall and Alderson (5 vols.), and Barnewall and Cresswell (10 vols.), these being the names of the reporters. They are quoted as East, M. & S., B. & A., and B. & C. Thus 3 M. & S. refers to the third volume of Maule and Selwyn's Reports. The year of the decision is often added.

Since 1865 the principal Reports have been those issued by the Council of Law Reporting. At first separate series were issued for the separate Courts. In 1875 a complete change was made in the organization of the Courts by the Judicature Act of that year. At the present time there is a Supreme Court of Judicature, divided into a Court of Appeal and a High Court of Justice, the latter being divided into three divisions corresponding to the older organization, namely, a King's Bench Division (for Common Law cases), a Chancery Division (for Equity cases), and a Probate, Divorce, and Admiralty Division (for cases formerly allotted to the Court of Admiralty and the Ecclesiastical Courts). Outside the Supreme Court lies the House of

Lords (*d*), which is still the Supreme Court of Appeal for all cases from the United Kingdom. Appeals from the Colonies and Dependencies go to the Judicial Committee of the Privy Council. Thus the Reports of the Council of Law Reporting are divided into four series: (a) Reports of cases in the King's Bench Division, quoted as K. B. Thus [1901] 1 K. B. means the first volume of the King's Bench Reports for the year 1901. (b) Reports of Cases in the Chancery Division, quoted as Ch., *e.g.*, [1901] 1 Ch. (c) Reports of cases in the Probate, &c. Division, quoted as P., *e.g.*, [1901] P. (d) Reports of cases in the House of Lords and Judicial Committee, quoted as App. Ca. or A. C., *e.g.*, (1901) App. Ca. or [1901] A. C.

Among other current reports are those issued by the *Law Journal* newspaper and by the *Law Times* newspaper, quoted respectively as L. J. and L. T.

As the Law Journal Reports are to be found in the library of the Sultanieh Law School and are generally quoted in this book, it may be well to add a few words as to the mode of citation. The Reports for each year are divided into five series: the King's Bench (K. B.), Chancery (Ch.), Probate, Divorce and Admiralty (P. D. & A.), Magistrates Cases (M. C.), and Privy Council (P. C.). The cases, whether at first instance or on appeal, are classified according to the Division in which they originated. Thus the report of an appeal to the House of Lords in a case which commenced in the King's Bench Division will be found in the volume of King's Bench Cases. The series entitled "Magistrates Cases" is principally concerned with reports from the Criminal Courts. In citing, the number of the annual volume is given and the index letter of the series. Thus 46 L. J. (M. C.) 17, means page seventeen of the section devoted to Magistrates Cases in the forty-sixth volume of the Law Journal Reports.

Republications of the older Reports are now in progress. The series of "Revised Reports," for example, contains a reprint of all cases of present practical value decided between 1785 and 1865. These Reports are quoted as R. R. with the number of the volume and page.

References to the Revised Reports are not usually included in English Law Books. In order to find a case in these Reports it is, therefore, necessary to know the year in which it was decided and the name of the original reporter. Suppose, for example, the student wishes to look up in the Revised Reports the case of *Guépratt v. Young*. This case is reported in 4 De G. & S. (*i.e.*, the 4th volume of "De Gex and Smale's Reports") and was decided in 1851. Having ascertained

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(*d*) The House of Lords sitting as a Court of Appeal consists of a few eminent judges, all of whom are Lords of Parliament.

these facts, which will probably be mentioned in the quotation of the case in the book which he is reading, the student will turn to the volumes of the Revised Reports containing the reports of cases decided in 1851, and in particular to that which contains the cases selected from the 4th volume of "De Gex and Smale's Reports."

A brief historical account of English law reporting will be found in Part II., Chapter V., of Sir Frederick Pollock's "First Book of Jurisprudence."

#### NOTE B.—FRENCH JURISPRUDENCE.

All the French "jurisprudence" currently quoted in the Courts is subsequent to the Revolution. The principal collections are those of Dalloz and Sirey, the *Pandectes françaises*, and the *Gazette du Palais*. These are periodical publications containing reports of current cases with explanatory notes. They contain at the same time the provisions of recent legislation. The decisions of the different kinds of Courts and the Laws and Decrees are collected in separate parts.

##### *Dalloz.*

The collection of Dalloz (*e*) is divided into five parts:—

- (1) Judgments of the Cour de Cassation (*f*).
- (2) Judgments of other Courts, both French and foreign.
- (3) Judgments of the Administrative Courts.
- (4) Laws and Decrees.
- (5) Summaries of judgments not reported in full.

A decennial alphabetical digest is also published, the last having appeared in 1907 (*g*).

##### *Sirey, and the Journal du Palais.*

These are independent collections dating from 1791, which have since 1864 contained reports of the same decisions, and they have only differed in size and pagination, the *Journal du Palais* being published in octavo, and the collection of Sirey in quarto. This difference disappeared in 1892, when the *Journal du Palais* adopted the same

(*e*) The original editor was Désiré Dalloz (1795–1869). His collection commenced in 1824, but was a continuation of an earlier series dating from the year X. under the name of Denevers.

(*f*) In French the word *cour* is confined to the superior Courts. The inferior Courts are termed *tribunaux*. The judges of the superior Courts are *conseillers* and their judgments are *arrêts*. (Loi, 20 avril, 1810.)

(*g*) References are made by quoting the year, part, and page of the volume for the periodical collection. Thus D. P. 02–1–52 means Dalloz Périodique, fifty-second page of the first part of the year 1902.

pagination as Sirey. References are made to the *Journal du Palais*—"Jour. Pal. 76, 314," i.e., year 1876, page 314.

Since 1892 reference can be made as follows:—Cass. 10th Nov., 1891. S. & P. 93, I. 341, means "Arrêt of the Cour de Cassation of the 10th November, 1891, recorded in the *Recueil général des Lois et Arrêts* (Sirey), and in the *Journal du Palais* volume of 1893, first part, page 341."

*Pandectes Françaises.*

This is a comparatively recent collection dating from 1886. The principal earlier decisions from 1789–1886 have been collected in six volumes which form a digest adequate for most purposes. Each part now contains six sections and an index.

- (1) Judgments of the Court of Cassation.
- (2) Judgments of the Courts of Appeal and of First Instance.
- (3) Laws and Decrees.
- (4) Judgments of the Administrative Courts.
- (5) Foreign decisions.
- (6) Decisions concerning registration, etc.

References are also made to the *Gazette du Palais* and the *Gazette des Tribunaux*, which are daily papers containing decisions of the Courts, founded the former in 1881 and the latter in 1826.

Other law journals which are sometimes cited are *La Loi*, *Le Droit*, and several provincial publications, such as the *Journal des Arrêts de Bordeaux*, *Moniteur judiciaire de Lyon*, etc.

The chief collections in Belgium are the "*Pasicrisie belge*" (1814), *Recueil général de la jurisprudence de Belgique* (1872), the *Pandectes périodiques (belges)* (1888), *Le Journal des Tribunaux* (1882), and *La Belgique judiciaire* (1842).

The student should note a radical difference between the method of law reporting in France and in England.

In England the report gives the speeches of the judge or judges made when judgment was given. These speeches explain the reasons for the judgment. If there is a Bench of judges and one or more dissent from the judgment of the majority the speech of the dissenting judge is also reported. These speeches are called "judgments," but there is also a formal judgment, which is not reported, since it merely records the nature of the Court's decision.

In France and in Egypt the report contains the formal judgment given by the Court, and this contains the grounds on which the decision is based, drawn up in a series of concise sentences.

In England the report is made by shorthand reporters (the "judgment" not necessarily being written), while in France and

Egypt a copy of the written judgment, which contains the arguments in favour of the conclusion to which the Court has come, is obtained from the Registry of the Court. In many cases in England the reports of the case are submitted to the judge for revision.

#### NOTE C.—EGYPTIAN LAW REPORTS.

Law reporting in Egypt has not been properly systematized, and consequently the collections are not very complete nor very satisfactory. There exist two official collections, one for the Native Courts, commenced in 1900, in which a selection of decided cases made by the Inspectors of the Ministry of Justice is published in Arabic, with summaries in English and French: the other is published by the Mixed Court of Appeal at Alexandria in French and Italian and consists of cases decided by the Mixed Courts (principally Court of Appeal).

The following are the chief collections in existence :—

##### *Mixed Courts.*

(1) The *Recueil officiel*, dating from 1875 (French and Italian), referred to as R. O., vol. , page .

(2) The *Bulletin de Législation et de Jurisprudence égyptiennes*, dating from 1889 (French and Italian), referred to as B. L. J., vol. , page . There are two ten years' tables of the summaries of the judgments published, the first for the years 1889-1898, and the second for 1898-1908, referred to as T. D. v<sup>o</sup> Obligations, No. 2974, i.e., Table décennale under the word Obligations, paragraph 2974.

(3) *Gazette des Tribunaux Mixtes*, dating from 1911. This is a legal paper containing articles on current legal topics, legal announcements, new legislation, and brief reports of recent cases in the Mixed Courts. In some cases the reports include the judgment or part of the judgment. Brief critical notes are sometimes added. (Referred to as Gaz. Trib., vol. , No. .)

(4) *Recueil Barbier*. Published by Barbier at Cairo in 1887 and 1888, containing the judgments published in those two years in the *Moniteur du Caire*.

(5) *Répertoire général de la Jurisprudence Mixte égyptienne*, by Lantz. First volume, 1875-1895; second volume, 1896-1905. This is an alphabetical table of summaries under subjects like the *Répertoire* of Dalloz or the *Pandectes françaises*, but the arrangement leaves a good deal to be desired. In the first volume were included cases decided by the Native Courts in the years 1894-1896, published in the

"Al Kada" of M. Schiarabati, but the "jurisprudence" of the Native Courts has not been reproduced in the second volume.

(6) Borelli Bey. *Codes annotés*, published in 1892. The Mixed Codes with corresponding articles of the Native Codes and the French Codes and notes of the decisions of the Mixed Courts, some not elsewhere published, but for the most part extracted from the *Recueil officiel*.

(7) Sayour. *Répertoire de la jurisprudence des Appêls Sommaires des Tribunaux Mixtes*, 1916.

#### *Native Courts.*

(1) "Al Kada," edited by M. Schiarabati, beginning in 1894. Only six volumes in Arabic were published, with short summaries in French. Its place was taken in 1900 by

(2) "Official Bulletin of the Native Tribunals," which is published by the Ministry of Justice. Decisions of the Court of Cassation, the Court of Appeal, the Courts of First Instance, and the Summary Courts are published in full in Arabic, and they are preceded by a summary in Arabic, English, and French. (Referred to as O. B., vol. , No .)

Besides the official reports there are some Arabic journals which publish decisions of the Native Courts, of which the chief are:—

(a) *Al Mahakim*: weekly, dating from 1890, containing legislation and jurisprudence.

(b) *Al Hukouk*: weekly, dating from 1886 (similar contents).

(c) *Al Istiklal*: at first monthly, from 1902–1907. From 1908 weekly. A critical review of Egyptian legislation and jurisprudence, publishing not only decided cases but *conclusions* and critical articles.

There has been published recently (also in Arabic only) an annotated edition of the Native Civil, Criminal, Civil Procedure, and Criminal Procedure Codes, with the Decree of Reorganization of Native Tribunals, by Philippe Bey Gélât. This laborious compilation contains summaries of decisions collected from the "Official Bulletin," "Al Kada," and the three journals above mentioned.

### § 5. SCIENTIFIC OPINION.

The importance of scientific or professional opinion upon the development of law has attracted the attention of all legal historians. So soon as a community has got beyond the stage at which law is confined to mere customary rules the law becomes the possession of a professional class. It

is obviously impossible in any community, other than of the most primitive kind, for the law to be known by common practice on the part of the whole community. Certain general rules are known to all, and merchants, landowners, or others who have constant dealings with a special department of law will have some detailed acquaintance with that portion at least. Moreover, as regards criminal law in particular, the concurrence of its principles with common ideas of justice make it known in outline to the community as a whole. But in every department distinctions are worked out and details accumulated which necessitate for their knowledge much study and practice. Thus the legal profession comes into existence, and knowledge of the law passes from the community to a class (*h*).

It is to the efforts of this professional class that the development of the law has been principally due.

In countries in which the administration of the law has become the business of an organized profession the members of the profession are usually divided into two classes, well designated by their English names, the Bench and the Bar. On the Bench sit the judges, at the Bar plead the advocates of the suitors to the Court (*i*). In most countries some

(*h*) See Savigny, "System," § 14. He characteristically says: "There is formed a special order of persons skilled in law who, an actual part of the people, in the order of thought represent the whole. The law is, in the particular consciousness of this order, merely a continuation and special unfolding of the folk law. It leads henceforth a double life; in outline it continues to live in the common consciousness of the people, the minute development and handling of it is the special calling of the order of jurists."

(*i*) See Note A at the end of this section for an explanation of the divisions of the legal profession in England and in France. The judges collectively are termed the "Bench" by a figure of speech because they remain seated during the hearing (cf. the French "*magistrature assise*"). The Bench was the form or seat upon which they sat. The barristers or advocates are termed the "Bar" because they pleaded their causes at the bar dividing the part of the Court-house reserved

members of the Bar, as well as performing, or instead of performing, the ordinary functions of advisers and advocates, devote time to the education of junior members of their profession or to the composition of commentaries upon the law. These represent the academic side of legal thought, the "schools," as contrasted with the practical side embodied in the Courts.

It is interesting to compare the importance in different countries of each of these classes from the point of view of its influence upon the development of the law.

In England the Bench is dominant and, as we have seen, the decisions of the judges are an authoritative source of law. But, as has been already pointed out, the judges in England are selected from among the leading members of the Bar, and they carry with them to the Bench the views and traditions acquired when in practice. In truth it may be said that in England professional opinion is merged in precedent. The Bar is, of course, not silent, and the output of works on the law is great. But these are, for the most part, books intended either for the beginner or as practical guides for the lawyer in his everyday work. Not that writings do not exist which deal with law from a scientific standpoint. But these are less in number than in countries in which the non-practising barrister has more influence. In England the Bench gives the law to the Bar, and in giving it the judge discusses the principles which he is applying much in the same way as a professional jurist might discuss them in a book on the subject.

Recently the extension of legal teaching in the Universities has increased the class of books written by men who have devoted the greater part of their lives to academic legal study; but this non-practising class of barristers occupies a much less important place in England than in France or

for the judges from that open to litigants (cf. the French "*barreau*"). By a similar figure of speech the representatives of the "*Ministère Public*" are called in French the "*Parquet*," i.e., the floor, because they occupied a part of the floor of the Court-house.



Germany. Consequently it is not surprising to find that most of the great lawyers in England have been great judges, Lord Mansfield and Lord Eldon being striking examples. Even the great institutional writers, of whom the most famous in the history of English law are Coke and Blackstone, occupied also positions on the Bench (*k*). But, as is pointed out by Mr. Dicey, the influence of text-books upon the development of English law may be easily underrated. The Courts in deciding a case are anxious to justify their decision according to some consistent scheme of logically coherent rules, and a good text-book will supply their need (*l*). The field in which the influence of the text-book has been most prominent in England is perhaps that of Private International Law, where the writings of Story, Westlake, and of Mr. Dicey himself have contributed to a remarkable degree in building up a body of rules. But as to other matters also legal text-books have in England far greater authority than formerly. English law books of the past, with some honourable exceptions, were little more than ponderous digests of the decided cases. But of recent years a new style of book has come into being in which cases are criticized from the

(*k*) William Murray, Earl of Mansfield, an eminent "common lawyer." He was Chief Justice of the King's Bench from 1756-1788.

John Scott, Earl of Eldon, the great Conservative Lord Chancellor in the early part of the nineteenth century. His influence upon the establishment of the rules of Equity was of incalculable importance.

Sir Edward Coke (1552-1633) was Chief Justice of the Common Pleas and afterwards of the King's Bench. His "Institutes," though in no way scientific in character, have become classical authorities on English law, more particularly on the law of land.

Sir William Blackstone (1723-1780) is famous as the first University teacher of the Common Law. Prior to his day English law was not taught at the Universities, but the establishment in the eighteenth century of the Vinerian Professorship in English Law at Oxford initiated a change. Blackstone was the first holder of the Professorship and delivered English law lectures at All Souls College. He is principally famous for his Commentaries on the Laws of England.

(*l*) Dicey, "Law and Public Opinion in England" (1st ed.), p. 363.

point of view of principle. The influence, for example, of such a book as the late Sir William Anson's "Law of Contracts" has undoubtedly been great in moulding the rules of English Contract Law.

The influence of the text-book writer has, however, been far less important in England than in France and on the Continent generally. Why this should be so it is not easy to say. Probably the fact that the English law is in the main original while Continental law is largely based on Roman Law has much to do with it. The English judges, having no written repertory of law upon which to fall back, turned almost inevitably to the decisions of their predecessors. The Continental judges referred back to the collections of the Roman Law and to the writings of the commentators, and the habit of reference to professional writings thus acquired has become traditional (*m*).

However this may be, even in the days before the Civil Code the great lawyers in France influenced the law not by decisions given on the Bench, but by their writings. Among such may be mentioned Du Moulin, Domat, and Pothier (*n*).

(*m*) Mr. Gray has an interesting chapter in which he compares the use of academic or professional writings in England and other Common Law countries with the Continental practice, and sets forth the results that appear to have followed from the difference ("The Nature and Sources of the Law," Chap. XI.).

(*n*) Charles du Moulin (1500-1566), a voluminous writer on French customary law and an early upholder of the necessity of unification of the law by codification.

*a* Jean Domat (1625-1696), whose best-known work is "Les Loix civiles dans leur ordre naturel," a stupendous attempt to harmonize the Civil Law with legal principle.

Pothier (1699-1772), the most famous of all French legal writers. His two principal works were an annotated edition of the Custom of Orléans, to which town he belonged, and the world-renowned "Traité sur les Obligations." This work is the basis of the codified French law of obligations.

For further details see Viollet, "Histoire du Droit Civil français," 3rd ed., pp. 224 *et seq.*

Pothier was the greatest of these, and his influence upon the development of French law has been of incalculable importance. He was a professor at the University of Orleans. It is true that he did also exercise judicial functions as a "conseiller" of the "Présidial d'Orléans," but it is through his writings alone that he has made his influence felt in legal history.

Since the publication of the Code the systematic discussion of the law by jurists, and in particular by lawyers occupying chairs at the Universities, has continued, and this discussion has had a marked influence upon French legal development. Side by side with the "jurisprudence" (view of legal questions adopted by the Courts) has grown up a body of "doctrine." "La doctrine" is defined as "the body of opinions and ideas set forth by jurists in their books" (o). Great respect is shown in France for the opinions of these doctrinal writers. They number among them the most eminent French lawyers of the day. The weight of their authority in France can be compared with that of judicial decision in England, though indeed the opinion of the French professor, however eminent, is not an authoritative source of law, for it is not legally binding upon the judge, though he is likely to be much influenced by it. Its importance is due to the respect in which it is held, and its influence on the growth of the law arises from this fact. Doctrinal writers in France have set themselves to interpret the Codes. To that end they have subjected the words of each section to an exact scrutiny and have sought by such examination to explain their precise import and the connection which exists between the different sections. Further, they seek to expound the principles upon which the Codes are based, so that decisions upon points not dealt with by its provisions may be in harmony with it.

Thus in France there exist two connected but sometimes

(o) Planiol, I., § 52.

opposed streams of legal opinion, neither of them strictly authoritative, but each having an influence upon the law actually administered. From the Bench comes a mass of jurisprudence, and from the Bar, and particularly from the non-practising section, comes a body of doctrine. The relations existing between these two bodies of opinion should be remarked. For many years after the promulgation of the French Codes the doctrine developed and expanded independent altogether of the jurisprudence. There was a divorce almost complete between theory and practice. In the schools the Code was regarded as a systematic and final statement of unchangeable and absolute principles of justice. Knowledge and understanding of these were alone necessary for the discovery of the key to every legal problem which might arise. In the Courts, on the other hand, the Codes only made their way slowly. They had to struggle with the habits of thought and traditional views of law which survived from the epoch before their compilation. The influence of these was maintained by the reactionary elements which re-entered France under the Restoration. It was not until the establishment of the Monarchy of July that the Codes fully succeeded in conquering the Courts (*p*).

It was not, therefore, surprising that doctrinal writers should have worked out their theories and expounded the principles of the Codes in serene indifference to the decisions actually given in the Courts. This duality continued during the whole of the first half of the nineteenth century. The doctrine, indeed, influenced judicial decision somewhat, since the judges and advocates had in their student days attended the lectures and continued to consult the writings of the academic jurists. But very frequently a difference in view occurred, and while the traditional doctrine adopted one

(*p*) Meynial, "Les Recueils d'Arrêts," in "Livre du Centenaire," I., pp. 176, 183, 185.

theory, the jurisprudence became more and more fixed in the opposite sense.

The last thirty years have, however, seen a noticeable change in the estimation in which the jurisprudence is held by French doctrinal writers. The change was first manifested in the schools by the occasional quotation of decisions to support particular theories, but the tendency to refer to cases grew until at the present moment the doctrine shows some sign of becoming an exposition of the principles of law applied in the Courts. It has, at any rate, entirely abandoned the old aloofness from practical life which marked it during the first half of the nineteenth century (*q*).

Undoubtedly this change is a beneficial one. The old doctrine, logical and consistent as it was, suffered under a disadvantage owing to the academic atmosphere in which it was developed. Law cannot be separated from life. It has already been pointed out that the spirit of the law is to be found in the life of the people. The establishment of a close connection between the doctrine and the jurisprudence is the surest guarantee of a development of law at once practical and systematic (*r*).

(*q*) For a short list of the principal French doctrinal writers see Note B at the end of this section. M. Charmont, in an essay on "Les Interprètes du Code Civil" in the "Livre du Centenaire," Vol. I., pp. 134 ff., discusses the history and modern tendencies of the doctrine. The current relations of the doctrine and the "jurisprudence" are graphically set forth by M. Esmein in his famous essay "La Doctrine et la Jurisprudence," *Rev. Trim.* (1902), pp. 5 ff. In spite of the tendency mentioned in the text English lawyers perusing French law books cannot but be struck by the difference in point of view between the English and the French legal writer. French writers now refer much to the jurisprudence, but they do so to illustrate their principles. The doctrinal principles are first, and the decisions second. But an English law book is primarily an exposition of the principles established by the cases. The cases are first and the criticism of them is second.

(*r*) It is difficult for one not in actual practice in the Egyptian Courts to form a very definite opinion as to the influence of French

The history of Roman Law furnishes us with another example of the influence of professional opinion upon the growth of law (*s*). It was the business of the Roman jurists to give opinions (*responsa*, from *respondere*, to answer) upon points submitted to them. The importance of these *responsa* cannot be properly appreciated unless we remember that at Rome the judges were not usually jurists. Professional learning was to be found at the Bar rather than on the Bench, if English terms may be used with reference to a state of things so topsy-turvy from an English point of view.

Under the Early Empire the *responsa* of certain selected lawyers were made authoritative; these became binding upon the judges and were therefore creative directly of law. And in the latest period of Roman Law, the writings of five selected jurists of the classical period were given the force of law by a Constitution of the Emperors Theodosius II. and Valentinian III. (Law of Citations, A.D. 426) (*t*). The

doctrine upon Egyptian decisions. Judging, however, from the cases reported in the Official Bulletin, one must conclude that frequent reference is made to doctrinal works. Thus in 1912 the following doctrinal works were expressly cited in judgments there reported: Carré et Chauveau ("Procédure Civile et Commerciale"), Baudry-Lacantinerie ("Privilèges et Hypothèques"), Aubry et Rau ("Droit Civil français"), Laferrière ("Droit Administratif"), Garraud ("Traité de Droit Pénal"), Chauveau et Hélie (Théorie du Code Pénal), Planiol ("Traité de Droit Civil"), Garsonnet ("Traité de Procédure"), Grandmoulin ("Droit Pénal égyptien"). And in several cases the annotated Codes by Dalloz and the *Répertoire* or *Supplément* were also cited.

There can indeed be little doubt that the writings of certain French jurists, in particular those of MM. Planiol, Baudry-Lacantinerie, and Garraud are at present among the most important formative influences in Egyptian law. This is partly due to the paucity of Egyptian doctrine and jurisprudence, but principally to the fact that the Egyptian judge has learnt to use these books in his student days.

(*s*) Clark, "Practical Jurisprudence," Part II., Chap. IX.

(*t*) See Walton, "Introduction to Roman Law," pp. 280-1, 293-5.

The exact operation of these arrangements is controverted.

student who turns to the Digest will find that it consists largely of excerpts from the writings of these great classical jurists and that these excerpts usually consist of the opinion of the writer on some point of law submitted to him.

The Roman jurist did not limit himself to the giving of *responsa* on questions which actually occurred in practice. He delivered opinions on hypothetical questions also. And as he often combined with his practice the duty of law teaching and law writing, the influence of his opinion came to be widely felt. A comparison may be made, therefore, between the work of the Roman jurists and that of the French doctrinal writers, but it is well to recollect that in earlier times at least the Roman jurist was essentially a practitioner, not a professor, and that it was in his practice that he found opportunities for influencing the growth of the law. The spirit of the practitioner is present even in the writings of the great classical jurists, glorified indeed by a breadth of view and grasp of general principle not to be found in those whose thought is entirely devoted to practice. To the end the form of the law preserved this close connection with actual practice which matured its growth. The Digest of Justinian might be compared to a Digest of Case Law, such as the Digests of "French Jurisprudence" or English "Cases"; books which are of an essentially practical character, but the Roman Digest is inferior in point of arrangement.

The jurisconsult also had dominating influence in the development of Mohammedan law. "The four principal schools of law among the Sunnis," says Mr. Justice Amir Aly, "named after their founders, originated with certain great jurists, to whom has been assigned the distinguished position of Mujtahid Imams, namely, Expounders of Law *par excellence*. By virtue of their learning and their eminence, they were entitled not to be bound in the interpretation of the law by any precedent, but to interpret it

according to their own judgment and analogy (kyas).” Of these four schools, namely, those founded by Abû Hanifa, Malik, Shafei, and Ibn Hanbal, the one of most interest in Egypt is the first named. The “fatwas” or decisions of the great Mohammedan jurists were collected and form a mass of legal authority of great importance. In particular may be mentioned the “Fatawa-i-Barâmiba,” containing the decisions of Abû Yusuf, the pupil of Abû Hanifa (*u*).

Jewish law also has in great part been developed by the same means. It originated in primitive custom, set forth in the early Code known to scholars as the Book of the Covenant (Exodus xxi.-xxiii., 19), supplemented in later times by the Deuteronomy and by the Priestly Code of Leviticus and Numbers. The new circumstances in which the people found themselves after the return from the Exile made vast additions necessary in order to adapt the old law to changing conditions. These additions form the principal part of the Mishnah, which was collected at the end of the second century of the Christian era. From the time of the destruction of Jerusalem by Titus (A.D. 70) onwards the Jews have ceased to form a state and have been dispersed throughout the nations. From that time dates the principal rabbinical activity. The first efforts of the Rabbis were directed to the reconciliation of the Mishnah with the early Codes (the Torah) which were alone regarded as having divine authority. This reconciliation was often effected only by means of much ingenuity and artificial reasoning. The mass of rabbinical interpretations (the Gemara) forms with the Mishnah the great collection of Jewish law known as the Talmud. Jewish legal activity by no means ceased with the completion of the Talmud (10th century). The development of the law has, however, necessarily been in the hands of the Rabbis, and it has been effected in part by opinions (*responsa*) given in answer to

(*u*) Syed Amir Aly, “Mohammedan Law,” Vol. I., p. 13.



concrete legal problems submitted to them (*Teshubot*, cf. the *fetwas* of Mohammedan jurists) and partly by doctrinal works. Of these the most important is the so-called Code of Maimonides (12th century), the *Tur* of Jacob ben Asher and the *Shulkan Aruk* of Joseph ben Ephraim Caro (14th century). These represent different schools of Jewish legal thought comparable to those of the Mohammedan legal world (*x*).

NOTE A.—DISTRIBUTION OF PROFESSIONAL FUNCTIONS.

In *England* practising lawyers are divided into two classes—(a) barristers, who have in most Courts the exclusive right to plead; (b) solicitors, who carry through what may be termed the business part of professional work and “instruct” the barrister upon the nature of the case which he is to argue. The barrister is deemed to be more “learned in the law,” and the solicitor, when difficult points arise, acts under his advice. Solicitors, however, have the right to plead in the inferior (County) Courts.

One of the principal functions of the solicitor is the drafting of documents, such as deeds, wills, contracts. Here again, however, a barrister is usually employed if points of difficulty arise. The separation of the two branches is maintained by a rigid observance of professional etiquette. For example, the barrister cannot be directly consulted by a client, he must always be approached through a solicitor.

The members of each branch form a close body, admission to which is only possible after a process resembling apprenticeship, success in professional examinations, and the payment of heavy fees. Thus barristers must be “called to the Bar” as members of one of the four Inns of Court, namely, Lincoln’s Inn, the Inner Temple, the Middle Temple, and Gray’s Inn; while solicitors are “enrolled” as such through the agency of the Incorporated Law Society.

In *Scotland* the division of functions between the two branches of the profession is practically the same as in England, but the term “advocate” is used in place of the term “barrister,” and the members of the solicitor branch of the profession are either “writers to the signet,” “solicitors to the Supreme Court,” “law agents,” “procurators” or “advocates” (in Aberdeen).

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(*x*) I am indebted to Mr. Frumkin of the Court of Appeal, Jerusalem, for this reference to Jewish Law.

In most countries this division of law functions does not exist, or not to so marked an extent. In *France*, for example, the "*avocat*" performs the functions of a barrister and also most of those of a solicitor. To become an "*avocat*" it is necessary to be "*licencié en droit*" of a French University and also to undergo a "*stage*" or period of preparation lasting three years. After having completed his "*stage*" the French "*avocat*" obtains inscription on the list of barristers of the Court and henceforth is a member of the Bar (*le barreau*). To obtain admission to the Bar of the Court of Cassation or the Conseil d'État is more difficult. This Bar is limited to sixty members. A retiring member sells his post to the incoming member, who must have practised as a barrister for at least three years. There exist, however, in France two classes of law agents who each perform duties corresponding somewhat to a part of the duties of an English solicitor. These are (1) *avoués*, whose principal duties consist in taking the formal steps in a suit. The *avoués* are ministerial officers and are appointed by the President. In fact the office is a saleable one, the retiring *avoué* selling his post to the incoming official. To be nominated *avoué* it is necessary to have a certificate of "*capacité*" from the Law Faculty of a University and to have passed an apprenticeship of five years in the office of an *avoué*. (2) *Notaires*, who are public officials charged with the duties of drawing up and authenticating documents. Success in a professional examination is required in order to be appointed a notary, and in addition a "*stage*" passed as clerk in a notary's office. Notaries are appointed by the President.

#### NOTE B.—LIST OF THE PRINCIPAL BOOKS OF FRENCH DOCTRINE.

Mention of the principal French doctrinal writers upon the Civil Law and the leading legal reviews will be found in Planiol, I., §§ 129-134. A more detailed account is contained in M. Charmont's essay in the "*Livre du Centenaire*" already referred to.

##### (1) *Civil Law.*

Among the early commentaries upon the Civil Code may be mentioned those of Troplong, *Droit Civil expliqué* (1838), and Toullier, *Le Droit Civil français* (1827). Among the more recent the following are important:—

Aubry (1803-1883) et Rau (1803-1877).—*Cours de Droit Civil* (ten volumes).

Baudry-Lacantinerie.—*Traité théorique et pratique de Droit Civil*.

This work is an agglomeration of separate treatises covering the whole of the Civil Law published under the general editorship of M. Baudry-Lacantinerie. A third edition, comprising twenty-nine vols., has recently been completed.

Beudant (1829-1895).—*Cours de Droit Civil français*, a posthumous publication of which a part only has already appeared.

Demante.—*Cours analytique de Code Civil*, completed by Colmet de Santerre (nine vols., 1849-1873).

Demolombe (1804-1888).—*Cours de Code Napoléon* (thirty-one vols., 1844-1879).

Huc.—*Commentaire théorique et pratique du Code Civil* (fifteen vols., 1892-1903).

Laurent (1810-1887).—*Principes de Droit Civil français* (thirty-three vols., 1869-1878).

Marcadé (1810-1854).—*Explication théorique et pratique du Code Civil*, completed by Paul Pont (1808-1888), originally published in twelve vols., the first of which appeared in 1842.

The elementary works best known in Egypt are *Précis de Droit Civil* by M. Baudry-Lacantinerie (10th ed., 1908), *Traité élémentaire de Droit Civil* by M. Planiol (6th ed., 1912), and *Cours élémentaire de Droit Civil français* by MM. Colin and Capitant, 1915-1916.

#### • (2) Civil Procedure.

Carré et Chauveau.—*Les Lois de la Procédure* (eleven vols., 1880).

Garsonnet et César Bru.—*Traité de Procédure* (eight vols., 3rd ed., 1913).

#### (3) Commercial Law.

Bédarride.—*Droit Commercial* (twenty-three vols., 1879-1880).

Lyon-Caen et Renault.—*Traité de Droit Commercial* (eight vols., 4th ed., 1906).

Thaller.—*Traité général théorique et pratique de Droit Commercial*. (Several volumes have been published.)

The students' manuals on this subject by M. Lyon-Caen and M. Thaller are well known in Egypt.

#### (4) Criminal Law.

Blanche.—*Étude pratique sur le Code Pénal* (seven vols., 2nd ed., 1888).

Chauveau et Faustin Hélie.—*Théorie du Code Pénal* (six vols., 6th ed., 1887-1888. Edited by M. Villey).

Garraud.—*Traité théorique et pratique du Droit Pénal français* (six vols., 2nd ed., 1898-1902). A new edition is in course of publication.

The best-known manuals are those of M. Garraud, *Précis de Droit Criminel* (11th ed., 1912); and M. Vidal, *Cours de Droit Criminel et de la Science Pénitentiaire* (3rd ed., 1906).

### (5) *Reviews.*

There are a very large number of French periodicals devoted to the discussion of legal subjects. Among the most important are the following:—

*Revue critique de Législation et de Jurisprudence.*

*Revue trimestrielle de Droit Civil.*

*Revue du Droit Public et de la Science Politique.*

*Annales de Droit Commercial et Industriel.*

*Revue Pénitentiaire* (*Bulletin de la Société générale des Prisons*).

*Journal de Droit International privé.* (Generally referred to by the name of its editor, M. Clunet.)

*Revue de Droit International privé et de Droit Pénal International* (edited by M. Lapradelle).

*Revue générale de Droit International public.*

*Bulletin de la Société de Législation comparée.*

*Revue Algérienne et Tunisienne.* (Interesting to Egyptians as containing frequent reports of cases, etc., in Mohammedan law.)

### (6) *Annotated Codes and Répertoires.*

To complete the list of books in actual use by French lawyers mention may be made of the series of annotated Codes in which references to the current jurisprudence and doctrine are collected and classified under the appropriate articles. There are complete series of such annotated Codes published by Dalloz and by Sirey, and also an annotated Civil Code by Fuzier Herman, and an annotated Criminal Code by M. Garçon.

The house of Dalloz has also published a famous *Répertoire* of which the current edition was produced between 1845 and 1870 in fifty volumes. This was followed by a Supplement (1887-1897) in nineteen volumes. This *Répertoire* is a digest of the French law and jurisprudence arranged methodically under proper subject headings. A new *Répertoire Pratique* by Dalloz is now in course of publication (publication commenced in 1910).

A *Répertoire* in fifty-nine vols. (1886-1905) has also been published by the publishers of the *Pandectus françaises*.

The earlier *Répertoire* of Merlin (3rd ed., 1827) is also sometimes referred to.

Comparison may be made with the English work known as "The Laws of England," designed to be a complete statement of the whole of the English law on all subjects with references to all relevant cases.

## § 6. NATURAL LAW AND EQUITY.

It has been already pointed out that the association of law and order has led men to use the term "law" in describing the ordered course of nature. This association of nature with law is very ancient. Greek philosophers in classical times were struck by the order or regularity observable not only in the inanimate universe, but also in the life history of animal beings, even of men. For all are born, grow up, and die on settled and uniform lines. Then again, in the conduct of men there are broad similarities resulting in like institutions and like social customs. Consequently people were led to believe in the existence of a force animating the universe and governing or directing the actions of men. This force they termed nature. A contrast was drawn between what was accidental and individual in men's actions and what had a permanent and common character. The rules of conduct which were permanent and common were regarded as due to the force of nature and formed Natural law.

In the hands of the ancient philosophers those ideas of nature and Natural law underwent a development which gave them immense influence. Ceasing to be regarded as that which actually existed, they were held forth as an ideal of that which ought to exist. The force of nature was identified with Reason, and Natural law was spoken of as the dictates of reason, so that a contrast was afforded between the

Positive law actually practised and a Natural or ideal law founded on reason to which the existing law ought to be made to conform (y).

This conception of an ideal law of nature passed from the philosophers to the jurists and had in various ways an important influence on the development of the Roman Law. The jurists contrasted the strictness of the narrow "*jus civile*," or law peculiar to the citizens of Rome, with the breadth and simplicity of the dictates of nature. They ultimately identified with this law of nature the rules of the "*jus gentium*" (the law of the peoples), *i.e.*, the law common to the subject peoples of the Roman Empire, as embodying what was common and essential in law in opposition to the special rules of the old Civil Law of Rome (z). The development of the Roman Law from the narrow law of a city to the law of the civilized world owed much to the influence of the conception, since it gave a breadth of view and a liberality of conception to the treatment of legal ideas by the Roman jurists which has never been surpassed.

The notion of an ideal law imposed upon men by nature survived the Roman Empire. In Christian times it was identified with the Law of God and was described as the eternal, immutable law revealed to men under the divine direction.

In later times its influence both upon legal and political thought has been important and extended. A new field was presented for its application by the establishment in a permanent form of the great territorial states of modern Europe and the increase in their mutual peaceful relations. A source had to be found whence could be drawn rules to

(y) Bryce, "Studies in History and Jurisprudence," II., 116.

(z) As to "*jus naturale*" and "*jus gentium*" see Walton, "Introduction to Roman Law," pp. 355 ff. Melville, "Manual of Roman Law," pp. 57 ff.

govern the conduct of international affairs. Whatever shadow of a common superior had previously existed vanished with the break-up of the Holy Roman Empire and the repudiation by the Protestant northern states of the supremacy of the Pope. The Dutch writer, Hugo de Groot, better known under his Latin name "Grotius," stepped into the breach. He contended that the relations of sovereign states *inter se* must be governed by the Law of Nature, and upon this foundation he commenced to build up the fabric of modern International law (a).

In the seventeenth and eighteenth centuries the theory of a natural law became a commonplace of political controversy. Political philosophers such as Hobbes, Locke, and Rousseau postulated the existence of a state of nature as preceding the establishment of civil government. In this state of nature individuals were free to act according to their own wishes, subject only to the rules of Natural law. Out of it arose political society founded upon a contract or covenant entered into by men, in accordance with which law-making and law-enforcing authorities were established (b). In the hands of the followers of Rousseau and the makers of the French Revolution the idea of Natural law became revolutionary in tendency. The revolutionary leaders appealed to the Law of Nature in their protest against political tyranny or what they alleged to be such. They claimed that sovereignty was founded on the general will and that no sovereign could destroy the natural rights of men, which had themselves a higher authority than the power of the sovereign himself. This idea is expressed in

(a) In his great work "De Jure Belli et Pacis" ("Concerning the Law of War and Peace"), published in 1625.

(b) Hobbes, "Leviathan"; Locke, "Treatise on Civil Government"; Rousseau, "Contrat Social." For a discussion and criticism of these theories see (*inter alia*) Green, "Principles of Political Obligation," §§ 42 fl.

such documents as the American Declaration of Independence (1776) and the French *Déclaration des droits de l'homme* (1789).

In the purely legal sphere the idea of a discoverable law of nature was used by eighteenth-century philosophers in their attacks upon the complicated and inequitable law of the day (c). They were fascinated by the vision of a body of rules commending itself to mankind by its simplicity and coherence and forming the ultimate expression of law for all. To some the French Civil Code seemed to approximate at least to this ideal (d).

It cannot be disputed that the belief in "Natural Law" served many useful purposes. In particular it lent authority to criticism of existing institutions and existing laws. So long as men believed that there did actually exist a Natural Law discoverable by men through reason, the legal philosopher was able to use this belief as a powerful weapon in attacking institutions and laws which he saw to be unreasonable and believed to be contrary to the dictates of nature. But the fact of the existence of any such Natural Law is now completely discredited. Law is recognized now to be a human and changeable institution and the critics of to-day attack existing laws not as being contrary to nature but as being, in their opinion, ill-adapted to carry out the ends which society has in view in establishing law or as directed to secure ends which the society ought not to seek. Adherents of the older theory thought of Natural Law as "unchangeable, eternal and universal, resulting necessarily from man's nature and independently of his will." To it

(c) The first article of the original draft of the Code Napoléon ran as follows: "*Il existe un droit universel et immuable, source de toutes les lois positives ; il n'est que la raison naturelle, en tant qu'elle gouverne tous les hommes.*" Fortunately this legislative enactment of a philosophic dogma was struck out at a later stage.

(d) See Maine, "Ancient Law," Chap. III., for a general account of some of the purposes served by the theory of Natural Law.



we now oppose the doctrine of historic evolution. Law is "a product of social life which is created by the steady inevitable advance of human development" (e).

Thus the dominance of the theory of natural law came to an end with the growth of the historical spirit and the application of the doctrine of evolution to human institutions. On the one hand the theories of the origin of society and social institutions which had been founded upon it were shown to have no truth in fact, and on the other hand the belief that practical law could be produced by rigid deduction from a *priori* principle was found to be inconsistent with the conditions of human development and noxious in its influence upon the development of the law. Law is the product of a changing social life, and the idea that its rules can rest on any immutable basis is untenable and prejudicial.

In spite of the exposure of the fallacies involved in the theory of natural law, traces of its former dominance still remain both in popular language and in popular thought. "Natural" right and "natural" justice are not infrequently appealed to in support of a claim often in opposition to the established law. No one would, of course, suggest either that the results of the application of law are always in accordance with ideas of moral justice or that the rules themselves are always the best calculated to achieve the ends of law. Claims of natural right in opposition to (or as supplementing) existing legal rights are presumably based on one or other of these objections to the existing system. As a rule, in appealing to natural right or in basing some claim on natural law the speaker means only to refer to commonly accepted doctrines of morality. When people say, as they sometimes do, that they have a natural right to live, or to be free, or the like, they probably mean that others are under a moral duty to support them, or to abstain from interference with them, a duty which may or may not be

(e) See Korkunov, "Theory of Law," Chap. III.

recognized by positive law, unless indeed they are confusing right with power and mean that in case of necessity men will decline to be bound to the observance of positive law and fall back upon the bare exercise of might. Moral right, meaning a claim in conformity with the moral law, is a well-recognized term, and it seems to introduce an unnecessary confusion of language to talk of natural justice and natural right if all that is meant is justice and right according to moral and ethical principle (*f*). The use of the term "Natural Law" has been almost entirely abandoned in England, if only to avoid confusion with the "Laws of Nature," that is, uniformities among natural phenomena. In France and Germany the corresponding terms *Droit Naturel* and *Naturrecht* are used to cover discussion of the general

(*f*) There is perhaps some scope for the use of the term "natural law" in criticizing the value of an existing rule of law. While repudiating the notion of a natural law imposed upon men independent of political authority, there is no reason why we should lose sight of the ideals of simplicity and coherence which the old conception kept vivid before the minds of the jurists. The term "natural law" may thus be used to mean a system perfectly adapted to meet the existing needs for law, freed consequently from the redundancies and obsolete distinctions which disfigure existing systems. (Cf. Green, "Principles of Political Obligation," §§ 9 ff., where the suggested conception of natural law is not dissimilar to this.)

From this point of view a revival of the idea of natural law has taken place in Germany and France of recent years as a protest against the excessive antiquarianism of the historical school. It is urged that too careful regard to the history of a legal rule tends to cripple its adaptability to actual social needs, no less than did the belief in the old *a priori* theory of natural law. Consequently the idea is put forward of a "natural law with variable contents" (*droit naturel à contenu variable*) which reconciles respect for legal principle with the necessities for continuous adaptation. The object of the conception seems to be to impress upon jurists the desirability of practical common sense in exercising influence upon the development of law (see *L'École historique et le Droit Naturel*, by M. Saleilles, in *Rev. Trim.* (1902), p. 80, and references there given. Charmont, "La Renaissance du Droit Naturel," pp. 167 ff.).

principles of legal science and the ethical basis of legal institutions (g).

A similar part to that played by Natural Law in legal development has been played by the allied notion of equity. Equity is the sense of fairness, "the regard for substantial as opposed to formal and technical justice" (h). It appears in Roman Law in connection with the Prætorian jurisdiction. The Prætors in making use of the *jus gentium* to mitigate the strictness of the *jus civile* proceeded according to notions of equity or fair dealing. And in applying this notion of equity they were but giving effect to the common dictates of reason which formed the contents of the Law of Nature.

But the most interesting development of the notion of equity is that which has taken place in England. Like the Roman *jus civile* the English Common Law was early found inadequate to meet all the needs of the people, "for that man's actions are so divers and infinite, that it is impossible to make any general law that may aptly meet every particular act, and not fail in some circumstance" (i). Thus it became the custom from the fourteenth century onwards that, when the rigidity of the Common Law resulted in a miscarriage of justice, the persons aggrieved should petition the king, in order that he might do justice according to notions of equity. Such petitions were referred to the Lord Chancellor. In course of time a regular Court, called the Court of Chancery, was formed, wherein the Chancellor administered what he regarded as principles of equity, mitigating the strictness of the Common Law. The limits of

(g) Cf. Lorimer, "The Institutes of Law, a Treatise of the Principles of Jurisprudence as determined by Nature," for a work in English upon these lines. Prof. Lorimer's book emanates from Scotland, where Continental influence has been stronger than in England.

(h) Bryce, *op. cit.*, II., 143. The whole of this essay by Viscount Bryce is well worth the perusal of the student.

(i) *Earl of Oxford's Case*, 1 White and Tudor, p. 733; quoted in Holdsworth, "History of English Law," I., pp. 237, 238.

the jurisdiction of this Court were gradually fixed. Moreover, as time went on the successive Chancellors began to decide the cases brought before them upon rules originally drawn from notions of equity, but which finally became as certain as those applied in the Courts of Common Law. Precedent came to have the same importance in the Chancellor's Court as in the Common Law Courts. But the body of law administered by the Chancellor continued to be and still is known under the name of Equity (*k*).

At the present day the part played by natural law or equity in the development of the law is difficult to define. Ideas of moral fairness and equal justice must necessarily have a strong influence in dictating legislation, and a judge in working out the consequences of a rule of law through the decisions can hardly help being influenced by the same considerations. How far this is legitimate and to what restrictions the tendency should be subjected will be discussed in connection with the subject of Interpretation.

It remains to note that cases occur in which the body of the law is so defective as to leave whole departments of human affairs entirely unregulated. A direct appeal to notions of justice and equity is in such cases almost necessary and is sometimes even expressly directed. Thus in the early days of British rule in India judges were expected to supplement native custom by reference to the principles of "equity and good conscience" (*l*). In the Statute of "Organization of Mixed Suits in Egypt (art. 34), the judges are instructed to follow "the principles of natural right and the rules of equity" where the law is silent, insufficient, or

(*k*) For a brief account of the origin of English equity see Maitland, "Equity," Lecture I.

(*l*) Pollock, "Expansion of the Common Law," p. 114. The Bombay Regulations (1827) directed judges, in the absence of Acts of Parliament, specific law, and usage, to follow justice, equity, and good conscience.

obscure. A similar provision is to be found in art. 29 of the Decree for the Reorganization of the Native Tribunals (*m*).

Naturally, in determining a legal question upon the grounds of natural right a judge is likely to be influenced by the existing rules upon the subject in his own or other civilized countries. The decisions of the Chancellor in England when administering equity were coloured often by notions of Roman Law. The English judges in India have imported doctrines of English law into that country under this plea. And the Mixed Courts, in protecting, for example, copyright and trade marks, which are not mentioned in the Codes, have followed the principles of law upon those subjects which have been adopted and applied in European countries (*n*).

(*m*) The original text of the Code Napoléon contained an article to a somewhat similar effect: "*Dans les matières, civiles, le juge, à défaut de loi précise, est un ministre d'équité. L'équité est le retour à la loi naturelle, ou aux usages reçus dans le silence de la loi positive.*"

Art. VIII. of the Hague Convention of October, 1907, relating to the establishment of an International Prize Court, provides that, when there is no rule of International Law applicable to the case before the Court, judgment is to be given "in accordance with general principles of justice and equity."

The Swiss Civil Code (art. 1) directs the judge to adjudicate when the law is silent "according to the rule which he would lay down as a legislator, but to follow approved doctrine and tradition." This seems equivalent to saying that he must follow his enlightened legal ideas of morality and good conscience. (See this article quoted again, *infra*, note, p. 189.)

(*n*) B. L. J., IV., 77; XVI., 25; Gaz. Trib., VI., No. 388; VII., No. 264; IX., No. 260; XI., No. 178. See also an article by M. Schaar on "La propriété littéraire, artistique et industrielle en Egypte," "L'Egypte Contemporaine," I., p. 87. Another interesting example of the same process is furnished by the partial reception of French law in Japan: see "Livres du Centenaire," II., pp. 781-785.

## CHAPTER IV.

### LEGISLATION AND CODIFICATION.

THE word "legislation" is derived from two Latin words — "*lex (legis)*," a law, and "*ferre (tutum)*," which means in this combination "to put" or "set." Thus, according to its derivation, legislation means law-making, and it is used occasionally in this general sense. More strictly, however, the word is used to designate one special method of law-making, namely, the formulation of rules of law by the law-making authority (a). From what has already been said (b) it must be clear that many rules are enforced in the Courts of the state as law and are observed as such, although they have never been expressed in the form of a decree or statute issued by the person or body of persons with whom the law-making power of the state lies. Many important rules of law in England are to be ascertained only by an examination of the judicial decisions upon which they rest. The Courts of the state enforce these rules, and they are undoubtedly rules of law, but they are not to be found expressed in any statute or law.

On the other hand a great and increasing part of the law of all civilized countries is to be found embodied by the law-making authority in decrees or statutes. In these decrees the sovereign power states to its subjects the rules which are henceforth to be considered as rules of law. The words which are used in stating the rules are the authori-

(a) Salmond, p. 127.

(b) See above, Chap. III.

tative expression of the sovereign's will. Thus a particular form is given to the rule laid down. In making the law the sovereign has given to it at once its force and its form. It is this formulation of the law which is the peculiarity of legislation. The law is by it "embodied in an authoritative form of written words and this literary expression is an essential part of the law itself" (c).

Law made by legislation is sometimes termed "written law." The term is an unfortunate one because it suggests that only that kind of law is put into writing, and this is not true. The law based upon precedent, for example, in England is to be found in written documents, namely the Law Reports, but yet according to this use of terms it would have to be described as "unwritten." The terms written and unwritten were first used in this connection by Roman writers, but in a more accurate and grammatical sense (d). In order to avoid the inevitable confusion between the juridical and grammatical meaning it is better to describe law made by legislation as "enacted" rather than as "written" law. All other forms of law may consequently be spoken of as unenacted.

Far the most important part of enacted or written law is that contained in the Laws and Decrees (e), Acts or statutes

(c) Salmond, p. 137; and cf. Génv: "Ce qui caractérise la loi écrite, c'est qu'elle représente, relativement à la règle de droit qu'elle consacre, la volonté d'un organe social déterminé, coulée dans une formule verbale, qui en fixe les contours et en définit le contenu pour l'imposer à tous." "Méthode d'interprétation en Droit Privé," § 92.

(d) The Romans used the term written law (*jus scriptum*) to mean law which at its inception had been committed to writing, as contrasted with law which, though it might afterwards have been expressed in writing, was not first so expressed. (Just. Inst., I., 2, §§ 3-9). See further as to the term "written" law, Gray, "Nature and Sources of Law," §§ 342 ff.

(e) The enactments emanating from the supreme legislative authority in Egypt are styled Laws or Decrees. It is difficult to say exactly

made directly by the central legislative authority (*f*). With these must be classified the Acts of such subordinate legislatures as possess practically unlimited powers to make law. Thus, the supreme legislatures of the self-governing colonies of the British Empire are strictly subordinate in their authority to the Imperial Parliament, but they enjoy practically unlimited powers of legislation. Prior to 1914 the Khedive was subordinate to the Sultan, but his power to make laws for Egypt was unrestricted. He could not indeed make laws binding upon foreigners except with the consent of the foreign Powers. But a limited legislative authority as regards these was conferred upon the General Assembly of the Mixed Court of Appeal: (1) by Decree of 31st January, 1889—under this Decree the powers of the Mixed Court of Appeal are limited to a scrutiny of decrees establishing certain kinds of police offences in order that their conformity with pre-arranged conditions may be

what difference exists between a Law and a Decree; for some years the plan was adopted of describing as laws those legislative enactments upon which the old Legislative Council had been consulted. This system does not seem, however, to be strictly followed. In France the statutes passed by the Chamber of Deputies and the Senate, constituting the supreme legislative authority, are styled laws (*lois*). The President, as head of the executive, has, however, the power to make decrees of a general nature, which are (1) "*décrets portant règlement d'administration publique*" when made under the express authority of a law. Before making these the advice of the Conseil d'État must be obtained; (2) *décrets réglementaires proprement dits* when made in exercise of the general power of the President as head of the executive. (Berthélemy, "Droit Administratif," pp. 100-103.)

(*f*) It should be remarked that in its so-called "juridical" meaning "written" law seems to be confined to enactments made by the supreme authority (Austin, Lect. XXIX.). But there is no real difference of form between laws formulated by the supreme authority or by subordinate authorities. If the term "written" law is to be retained at all, it must be extended to include all law formulated by the central authority or by any subordinate law-making authorities owing their powers to it.



established (*g*); (2) by the amendment of art. 12 of the Mixed Civil Code (Law 17 of 1911) (*h*).

In addition to the law thus directly made by supreme legislative authorities there exists in all countries a mass of rules made by executive, judicial, or local authorities for the detailed regulation of matters which come within the range of their powers. Under this head may be placed Ministerial Orders and Regulations, Rules of Procedure, and the like. In Egypt government is largely centralized, and this subordinate legislation is consequently made by the central executive departments or their direct representatives (*i*), but in countries such as England, in which the decentralization of powers gives greater scope for local or private enterprise, are to be found many public or quasi-public bodies possessing the power to make regulations of their own. Such, for example, are the by-laws made by County Councils, Municipal Councils, by railways and the like.

The quantity of law made in an enacted form at the present time in every civilized country is enormous. Parliaments or other legislative authorities are abundantly active

(*g*) See fully as to the history and scope of this Decree, Pélissie du Rausas, "Le Régime des Capitulations en Egypte," Vol. II., pp. 451 ff.

(*h*) To give legislative functions to the judiciary seems a strange proceeding, but it was very difficult to find in Egypt any other international body possessing the general confidence of foreign residents. And the dogma of separation of the legislative and judicial functions must yield to considerations of practical convenience. As remarked below the final Courts of Appeal in many countries have originally been part of the legislature.

(*i*) Orders, some of which partake of the character of legislation, but many of which are merely executive, are issued by the Ministries and also by the Mudirs and Governors of towns. The consent of the Provincial Council is now necessary for the promulgation, modification, and abrogation of by-laws (*règlements*) by the Mudir, and orders and by-laws cannot be made applicable without the like consent (Law No. 22 of 1909, art. 4).

The municipality of Alexandria possesses the power to make by-laws.

and pour forth annually a mass of new law such as would have astonished men of earlier generations. For example, in the year 1919 as many as one hundred and two new statutes were passed by the British Parliament, many of them of considerable length. Among the subjects with which they dealt were Housing and Town Planning, Land Settlement, Trade Marks, Patents and Designs, and Indian Government. Similar activity is manifested in France.

This extraordinary legislative activity is of modern growth. Its cause is probably to be found in the increased range of the activities of the modern state and its centralizing tendency. For good or evil, the state tends more and more to be regarded as the normal regulator of social life and director of social activities. It, also, is the instrument by which the rapid and radical changes demanded by the restless minds of the men of to-day are carried into effect.

In an era of change such as ours legislation is the natural method of law-making. A change in the law is effected by the simple process of repeal and substitution of new rules. The astonishing ease of this process compared with the circuitous and tedious methods by which changes in the law were brought about in earlier times may perhaps give cause for enquiry into its real effectiveness.

Then, again, legislation has the advantage of proceeding by direct statement of broad rules. The legislator, so far as his imagination will carry him, makes provision for all future cases by laying down rules to cover them. Custom is founded on the past and its changes are difficult to control. A law made by the piling up of precedents develops at uncertain speed, and a wrong step once taken is difficult to retrace. The development of a principle is dependent upon the presentation for decision of cases which illustrate its application. But with a stroke of his pen the legislator can alter by statute the principles previously applied, lay down new ones, and direct their future development.

It is not, therefore, surprising to find that legislation plays a very important part in law-making at the present day. But its importance must not be overestimated. The greater part of the law made by legislation is concerned with the organization and powers of public authorities, the regulation of public interests and of the relations existing between the citizen and the state. The development of the law concerning the private relations of citizens with one another is still effected principally by the action of the Courts and by scientific writings. Great changes are occasionally made in this law by means of legislation. But it will be found that it is here that the historical continuity of law has been most strictly preserved, and the principles gradually evolved through centuries of growth are for the most part left unaffected by legislative alteration.

This is true even when, as is frequently the case, the principal rules of the law have been issued in an enacted form as a Code. During the last century there has been a strongly-marked tendency in favour of such codification. In country after country Codes have been adopted in which the law has been set forth in a series of more or less carefully drawn articles arranged under appropriate headings.

What has been already said in speaking of the sources of law is sufficient to show how great a mistake it would be to suppose that law can only exist, or even most naturally exist, in an enacted form. In the history of the three great systems of law to which reference has already been made—Roman Law, Mohammedan Law, and English Law—legislation played but little part. The development of Mohammedan law took place through the instrumentality of professional jurists, and that of English law through the decisions of the Courts. Both these two systems have remained as a whole in an unenacted form to the present day (*k*).

(*k*) In England a very large part of the law exists in the form of Statutes, and the Statute Law (enacted law) is sometimes contrasted

But written or enacted law has, it is thought, at least one great advantage. For its provisions can be more easily ascertained, and can be ascertained with greater definiteness, than can those of unenacted law. This fact led to parts of the law being put into an enacted form at a very early date. The Code was a very early form of law (*l*). The primitive Code had, however, very little in common with its modern counterpart. It was a written statement of the principal customary rules observed in the community, and its great advantage was the publicity which it gave to these rules (*m*). The difficulty of ascertaining with certainty what customary rules form part of the law has led in later epochs to redactions of the customs in a written form. Rules established by custom can be authoritatively ascertained only by evidence of the observance of the usage in question. To prove a custom in this way was found inconvenient, and consequently, in days when custom was an important source of law, written statements of the accepted customs were frequently drawn up, and these served as proof of the existence of the customary rules. The reduction of the rules to writing would not of itself affect their customary authority. But, in any case, it must tend to have that effect. The written statement of a custom tends to be regarded as itself authoritative. As the customary character of the rules slips into oblivion their authority comes more and more to rest upon

with the Common Law (unenacted law). As to codifications of Mohammedan Law, see below, pp. 164, 167.

(*l*) The custom of early society when first reduced to writing usually took the form of a summary of rules mainly in the form of prohibitions. The most accessible of these early Codes perhaps is the so-called Book of the Covenant (Exodus xxi.-xxiii. 19), which Biblical scholars consider to be the earliest form of Jewish law. The XII. Tables of Roman Law furnish us with a later example emanating from a more developed society. Much earlier in date are the Laws of King Hammurabbi, who is supposed to have reigned in Babylon about 2000 B.C., but these appear to represent a still later stage of legal development.

(*m*) Maine, "Ancient Law," pp. 14 *et seq.*

their inclusion in the "Custumal," as the written collection of the customs is often called (*n*). In the French *pays de coutume* the need for authoritative statements of the customs was strongly felt, and led to official redactions being made of the existing customary law. This work was first undertaken under Charles VII. in the middle of the fifteenth century and continued at intervals for several centuries (*o*). As a consequence law which had previously been customary was largely put in the form of enactments. For the promulgation of the completed collection gave to the rules legislative force (*p*).

The same change has tended to take place with reference to law based upon Precedent. Of recent years English jurists have made attempts to state the rules derivable from judicial decisions in the form of a Code or Digest; that is to say, books have been published professing to state the effect of these decisions in a series of articles carefully worded so as to express exactly what the authors consider that the cases really decide (*q*). These books, being of a purely private character, only represent the considered views of the authors. But in some cases at least they are regarded as the first step towards codification of the law. Indeed some small parts of the English Common Law have been already thrown into code form. Perhaps the best example is furnished by the Sale of Goods Act, 1893, which is intended

(*n*) Viollet, "Histoire du Droit Civil fr.," pp. 179, 192, 193, 206, 207.

(*o*) Esmein, "Histoire du Droit fr.," pp. 741-752.

(*p*) Esmein, *op. cit.*, p. 749. "La rédaction . . . fit des coutumes de véritables lois écrites qui dérivèrent dorénavant leur force obligatoire non plus du consentement tacite des populations mais de l'autorité royale qui les décrétent."

(*q*) Among such may be mentioned Sir James Stephen's "Digest of Criminal Law," and "Digest of the Law of Evidence," Prof. Dicey's "Conflict of Laws," and, in particular, the ambitious "Digest of English Civil Law" published under the editorship of Mr. Jenks.

to state in the form of a statute the rules resulting from the decisions of the judges with reference to the sale of goods (*r*).

The superior accessibility and greater certainty of enacted law has, however, led to more ambitious attempts to express the whole of the existing law in that form. Of these attempts the first of great importance (*s*) culminated in the French Codes. Codifications of portions of French law had been made by Ordinances drawn up and promulgated in the reigns of Louis XIV. and Louis XV. under the guiding influence of Colbert and later of d'Aguesseau. The principal of these were the Ordinance of Civil Procedure, 1667, the Ordinance of Criminal Procedure, 1670, the Ordinance of Commerce, 1673, and four Ordinances dating from the reign of Louis XV. upon Gifts (1731), Wills (1735), Substitutions (1747), and Forgery (1737) (*t*). These partial codifications were undertaken partly with a view to simplify and unify the French law and partly to secure a clear written statement of the law hitherto dependent upon custom, the practice of the Courts, and Roman authorities (*u*).

Very early in the Revolutionary epoch the project of a complete Code of Law for the whole of France was mooted and attempts at its realization made. A draft Civil Code was indeed presented to the Convention in 1793, but the scheme fell through. Other schemes were put forward, but it was reserved to Napoleon to provide the driving power necessary for the consummation of the work. In 1800 (24 Thermidor, An. VIII.) a commission was appointed,

(*r*) Cf. also Bills of Exchange Act, 1882; Partnership Act, 1890. A commencement has also been made in codifying the English Criminal law by the issue of codified Laws of Perjury (Perjury Act, 1911), Forgery (Forgery Act, 1913), and Theft (Larceny Act, 1916).

(*s*) The well-known Prussian Code of 1794 was the most important modern European Code promulgated prior to the Code Napoléon.

(*t*) Esmein, *op. cit.*, pp. 780-788; and see also for a brief account in English, Lee, "Historical Jurisprudence," pp. 423-427.

(*u*) Viollet, *op. cit.*, pp. 236 ff.

consisting of Tronchet, Bigot du Préameneu, Portalis, and Malleville, charged with the duty of preparing a Civil Code. It is not necessary here to describe in detail the progress of the work, nor the difficulties encountered (*x*). The Code was promulgated as a whole by a law of 30 Ventôse, An. XII. (21st March, 1804). In structure it was conservative in character. Vast changes in the existing law had been made by the Revolutionary assemblies, but these were for the most part rejected. The Code represented, indeed, a compromise between the old law of the monarchy and the newer revolutionary ideas. It preserved the historic continuity of French law while admitting certain changes demanded by the opinion of the time (*y*).

Thus the Civil Code was, on the whole, a restatement of the existing law, or at least of law which was already applied in some part of France (*z*). The writings of Domat and Pothier in particular were laid under contribution. Indeed it has been calculated that Pothier is responsible for three-fourths of the whole Code. The Royal Ordinances already

(*x*) See M. Esmein's article, "L'Originalité du Code Civil" in "Livres du Centenaire," I., pp. 5 ff.; and in English see "Cambridge Modern History," IX., pp. 150 ff.

(*y*) The extravagant claims made on behalf of the Code Napoléon are described in an amusing manner in Chap. I. of a little book by M. Maxime Leroy, "Le Code Civil et le Droit Nouveau." Cf. p. 6: "La légende du Code Civil est née au Conseil d'Etat de l'admiration avisée des rédacteurs consulaires eux-mêmes, qui se louent hyperboliquement dans leur œuvre: Louvet l'appelle le 'Code immortel'; Bigot Préameneu le compare à une 'arche sainte' digne d'un respect religieux; Grenier croit qu'il deviendra 'la morale universelle'; tous enfin, pensent qu'il 'sera cité pendant des siècles.' C'était le nouveau droit romain, la raison écrite du monde moderne."

(*z*) Cf. Viollet, *op. cit.*, p. 258. "Si nous envisageons, en effet l'ensemble du droit civil moderne, et si nous le comparons au droit du XVIII<sup>e</sup> siècle, c'est-à-dire au vieux droit français, lentement élaboré par le temps et les hommes, nous arrivons à cette conclusion: déduction faite de ce qui est purement féodal, l'ensemble traditionnel de notre droit a persisté, avec quelques modifications, dans le Code Civil actuel"; and see an essay on "French Law in the Age of the Revolution" by this learned writer in "Camb. Mod. Hist.," VIII., pp. 710 *et seq.*

mentioned were largely drawn upon. The most important alterations in the law consisted in the rejection of unpopular institutions such as entails (*substitutions*) (a) and the permission of divorce (b).

The compilation of the Civil Code was rapidly followed by that of others. A Code of Civil Procedure, based for the most part on the Royal Ordinances, was promulgated 24th April, 1806, and a Commercial Code, a very imperfect work, which in part followed the Ordinance of 1673, was brought out in 1807. The work was continued by the composition of a Code of Criminal Procedure (1809) and a Penal Code (1810). Although no systematic revision of the French Codes has since taken place, numerous additions and alterations have been made as experience showed them to be necessary. The Codes in their present-day form differ, therefore, considerably from their originals, and are, moreover, supplemented by later laws not embodied in the Codes themselves. Further, as has been already suggested, the Codes have been continually subjected to a process of interpretation by which their meaning has been elucidated and their application to new cases explained. It must not be supposed that a complete knowledge of the law of any country can be obtained by mere acquaintance with the provisions of its Codes and Laws. No Code however complete can be expected to do more than lay down the main principles upon which law is to be administered and to provide clear rules for those cases which are of common occurrence. The art of the lawyer consists in the reasoned application of the rules which the Code provides to the complicated diversity of the affairs of men. Groups of facts daily arise which present legal problems for solution. It is for the lawyer to ascertain the exact legal import of the

(a) F. C. C., art. 896.

(b) Divorce was again prohibited by a law of Louis XVIII. (8 mai, 1816). It was re-established by the law of 9 juillet, 1884, now in force.



facts and to subsume them under some general principle or rule of law. The process is much the same whether the rules of law be declared in the form of a Code or enactment or be derivable only from a study of the previous cases. But in the former case the limits of the rule to be applied are likely to be more clearly defined.

It is natural that the decisions of judges of reputation and the opinions of jurists of acknowledged merit should be consulted by those called upon to decide these questions. In this way a body of Jurisprudence and Doctrine has arisen and the words of the Codes have been overlaid with comments and explanations, forming what is in effect a body of unwritten law of immense importance.

The impulse to codification to which so powerful a contribution was given by the composition of the French Codes has borne much fruit. A list of the Codes of law now existing would be lengthy indeed. Among those of greatest interest in Egypt may be mentioned the French Civil Code (1804), the Italian Civil Code (1865), the Ottoman Civil Code (Mejelle) (1869), the German Civil Code (1896), the Swiss Civil Code (1907), and Code of Obligations (1911), the Maroccan Code of Obligations and Contracts (1913), the French Commercial Code (1807), the French Penal Code (1810), the Ottoman Penal Code (1858), the Indian Penal Code (1860), and the Sudan Penal Code (based on that of India) (1899). In England, in Scotland, and in countries which have received the English Common Law, in particular the United States of America, the law has, as a rule, not been codified. English lawyers fear the paralyzing effect of a Code upon legal development. They prefer to leave the law in a state of solution rather than to precipitate the rules in a form presenting greater subsequent difficulty of transformation (*c*).

(*c*) See note at the end of this chapter for a further discussion of the subject of codification.

In some cases these Codes are statements of the pre-existing written and unwritten law of the countries of their origin. Thus the German Civil Code was compiled from the Roman and customary law then in force in Germany. In other cases the Codes are copied from the law of other countries, being either modified statements of the Common law of England, such as the Indian Penal Code, or copies of foreign Codes, as in the case of the Sudan Penal Code.

To this latter class belong also the Egyptian Codes. It cannot be said that the law of Egypt was codified when these were compiled. More correctly speaking, it was first issued in the form of a Code. For the history of the Egyptian Codes reference may be made to books dealing with the subject (*d*). A brief summary will suffice here.

The Mixed Codes were drawn up and promulgated in 1876 in order to provide a body of law to be administered by the new Mixed Courts. Six Codes were so issued, namely, a Civil Code, a Commercial Code, a Code of Maritime Commerce, a Code of Civil and Commercial Procedure, a Penal Code, and a Code of Criminal Procedure. They were all abbreviated copies of the Codes of France. The two Criminal Codes had but little application owing to the very limited criminal jurisdiction of the Mixed Courts. The Codes are preceded by a Decree for the Organization of Mixed Suits.

One cannot but feel that the hurried and slovenly manner in which the Mixed Codes were compiled reflects little credit upon those responsible. A great opportunity was missed. While it was not unreasonable to take as a basis for Mixed

(*d*) For the history of the introduction of the French Codes into Egypt, see M. Arminjon's article in the "Livres du Centenaire," Vol. II., pp. 735 ff.; and more briefly in Scott, "The Law affecting Foreigners in Egypt," pp. 269-279, 296-297. Dr. Goudy has made an interesting comparison between the destiny of the modern Roman Law in Egypt and that of the *jus gentium* in Rome, for which see L. Q. R. (1907), p. 415.

Law the Codes of the Mediterranean nations to which most of the foreigners in Egypt belonged, a workmanlike rescension of the French Code in the light of a century of experience ought to have been attempted. Criticism has been addressed particularly to the inadequacy of the Commercial Code and the Code of Civil Procedure, the first of which takes little account of the enormous changes in commercial life since the date of the promulgation of the French Code of Commerce (1807), and the latter institutes a procedure which gives the maximum advantage to unscrupulous litigants. It is earnestly to be hoped that under a new regime drastic changes in these Codes will be effected.

In view of the pending transfer of the criminal Consular jurisdiction to the Mixed Courts a new Draft Penal Code has been prepared for application, in the first place, to foreigners. This Code, though retaining many of the features to be found in the existing Code, borrows largely from Italian, Belgian, English, and Indian legislation, and should prove a distinct step in advance in the history of Egyptian law.

When the time came for the reorganization of the Native Courts and the Native Law, the precedent of 1876 was followed. Six Native Codes were issued in 1883, and these followed with slight modifications the Codes already applied in the Mixed Courts. The arrangement was convenient because it prevented a diversity of law in Egypt, but it had its disadvantages. The Mixed Codes had been hurriedly compiled, and, moreover, it by no means followed that a law suitable for Europeans in Egypt, coming as most of them do from countries in which the law is mainly French in character, is equally adapted for a population so different in history and characteristics as that of Egypt.

Two of the Codes of 1883, namely, the Penal Code and the Code of Criminal Procedure, have been revised, and the new Codes as revised were promulgated in 1904. As in the case of the Mixed Codes, a Decree of Judicial Organization

preceded the new Native Codes of 1883. Following this precedent, the new Penal Code and Code of Criminal Procedure were each brought into operation by a Decree which fixed the date from which it was to come into force.

With the Egyptian Codes may be compared those of the Ottoman Empire, which have a special interest for Palestine, in which country they are still applied. The Ottoman Codes are, like the Egyptian, mainly French in origin, and are the outcome of the reforming spirit which spasmodically affected the Turkish Government during the latter half of the nineteenth century. The Ottoman Penal Code was first published in 1858. Its general scheme is French, and many of its articles are literal translations of articles of the French Penal Code; but it has been much modified by subsequent legislation, particularly at the time of its re-issue by the Turkish Parliament in 1911.

The Ottoman Commercial Code (1850), the Ottoman Code of Maritime Commerce (1863), and the Ottoman Codes of Civil and of Criminal Procedure also follow French models. None of these can be regarded as satisfactory examples of local legislation, and it is already proposed to supersede the Ottoman Penal Code in Palestine and to apply there a body of Penal law of a more modern and scientific character (*e*).

The Ottoman Civil Code, known as the *Mejelle*, is of a very different character. It is drawn entirely from Mohammedan sources, and purports to be a compact statement of the rules of the Sacred Law upon the subjects with which it deals (*f*). Its scope does not include marriage and

(*e*) It has been proposed to apply in Palestine the new draft Penal Code recently drawn up in Egypt and intended to supersede the Mixed Penal Code.

(*f*) As to the relation of the *Mejelle* to the Sharia, see the Report of the Ottoman Civil Code Commissioners in Young, "Corps de droit Ottoman," VI., pp. 169 ff. See also "The Legal System of Turkey," by Sir Auton Pertram, L. Q. R. (1909), p. 24, and Modern Ottoman

succession, but is limited mainly to what the compilers call "transactions in general." By this term is meant business transactions outside the family circle, that being the part of the law which is of general application, as contrasted with the law of the family and of succession which is special to Moslems. It contains sixteen books (*g*) and 1851 articles.

In its form and contents the Mejele differs much from the Codes of Europe. It is less systematic and concise, but more informing. It strikes the European reader rather as a mass of opinions upon special legal questions grouped under appropriate headings than as a Code of Law in the Western sense. If an outsider may hazard an opinion, its precepts appear to be dictated by sound sense and genuine legal acumen, and the law laid down is well adapted to the Eastern world of yesterday, but much difficulty would be experienced in applying it to a growing commercial community. Many of its provisions seem quaint to a Western lawyer and others are clearly an expression of the special conditions of a Moslem society (*h*), but in general principle the law itself is usually of unimpeachable soundness.

*Promulgation of Laws.*—It is a necessary assumption that

Law (a review of Young's work by Sir Roland Wilson) in *Jour. Soc. Comp. Leg.*, XVII., pp. 41 ff. There is an English translation of the Mejele by Dr. Grigsby (London, 1895).

(*g*) The titles are as follows: Prologue (Definition and Distinctions in the Sacred Law; Fundamental Principles); Bk. I., Sale; Bk. II., Hire; Bk. III., Suretyship; Bk. IV., Transfer of Debt; Bk. V., Pawn; Bk. VI., Things Entrusted (Deposit, Loan); Bk. VII., Gift; Bk. VIII., Wrongful Appropriation; Bk. IX., Interdiction, Violence, Pre-emption; Bk. X., Joint Ownership; Bk. XI., Mandate; Bk. XII., Compromise; Bk. XIII., Admission and Acknowledgment; Bk. XIV., Actions; Bk. XV., Proof and the Oath; Bk. XVI., Judges and Judgments.

(*h*) See, for example, arts. 1795–1799 (Concerning the Manners of a Judge), arts. 1198 ff. (Rights and Obligations of Neighbouring Properties), arts. 929 ff. (Damage Done by Animals).

every subject of the state is acquainted with the terms of the new laws which are made. In many countries special steps are taken to inform the public of their provisions, and the law is not enforceable until this has been done. The first article of the French Civil Code provides that laws shall be executory in virtue of promulgation by the President and shall be enforced so soon as that promulgation can be taken to be known. To fix the moment at which knowledge of the promulgation must be attributed to citizens a period dating from the actual promulgation was fixed, calculated on the basis of the distance of the chief towns of the various departments from the place of promulgation, that is to say, from Paris (i). Promulgation is effected by publication in the *Journal Officiel de la Republique Française*. Egypt has followed this precedent, it being provided by art. 1 of the Decree of Reorganization that laws shall become binding over the whole of Egypt in virtue of promulgation made by the Khedive (Sultan), and will be enforced from the moment when the promulgation can become known. Such knowledge is attributed to every one after the expiration of thirty days from the date of promulgation. The promulgation is effected by publication in the Official Journal.

Promulgation, though possibly a useful formality (j), is not essential in law-making. It is unknown in England, where statutes operate without promulgation from the moment when they receive the Royal Assent or from the day

(i) F. C. C., art. 1. These delays have been abolished by Décret 5 nov. 1870.

(j) But one must admit that it is out of date. In the days before newspapers an official promulgation, often by oral publication in some frequented place, was no doubt useful. But to-day, is it to be supposed that Frenchmen really hear of new laws by earnest perusal of the "Journal Officiel"? Experience does not lead me to think that the Official Journal in Egypt is more popular. Cf. Gray, *op. cit.*, §§ 351 ff. The Decree of 5th Nov. 1870, has, however, apparently escaped this learned writer's attention.

fixed in the statute itself. The modern English practice is to provide expressly in statutes of any importance that they shall come into operation upon a fixed day.

#### CODIFICATION.

The advantages and disadvantages of Codification have been the subject of much discussion in Europe. The long series of modern Codes appears to show that the substantial victory lies with those who advocate the measure. It is mainly in countries of which the legal system is based on the English Common Law that codification has made least progress. This arises rather from the special methods of the development of this law than from any inherent difficulty in stating Common Law rules in Code form.

In Egypt the discussion of this question can arouse little interest. The sudden introduction of a body of foreign law into the country was necessarily made in statute form. This body of law is now well established, and the accomplished fact is itself a bar to any speculation upon the subject. Apart from the foreign law thus introduced into the country in Code form there exists indeed a body of native Mohammedan Law the sources of which are uncoded. To codify the Mohammedan Law in the sense in which the term codification is employed in Europe would appear to be impossible. A Code should in strictness supersede the older authorities. But the religious character of the Sacred Law makes it impossible for any human power to substitute itself for the authority upon which that law now rests. This point was well put in the Report of Lord Romilly's Commission appointed to consider the question of the codification of the law of India. "The Hindu Law and the Mohammedan Law derive their authority from the Hindu and the Mohammedan religions. It follows that as a British Legislature cannot make Hindu or Mohammedan religion so neither can it make Hindu or Mohammedan Law. A Code of Mohammedan Law or a Digest of any part of that law if it were enacted as such by the Legislative Council of India would not be entitled to be regarded by Mohammedans as very law itself, but merely as an exposition of law which possibly might be incorrect." In spite of this difficulty, more or less authoritative Codes of the Sacred Law exist in Egypt which, while not superseding the authorities upon which they are based, yet serve in practice most of the purposes of an enacted Code and are referred to in the Courts as such.

These compilations were made in accordance with the provision of art. 36 of the Statute of Organization of Mixed Suits to the effect

that the laws relating to the native Personal Statute should be published by the Government. To fulfil this promise a Digest or Code of the Mohammedan Personal Statute according to the Hanafite Rite was drawn up by a Council of Ulemas under the presidency of Kadry Pasha, a judge of the Mixed Tribunal at Alexandria, and this compilation was published by the Government. At a later date Kadry Pasha also compiled Codes of the Mohammedan Law of Immovables and Obligations (1893) and Waqfs (1896), which were published by the Government and have the sanction of the Grand Mufti of Egypt.

In British India no codification of the Mohammedan Law as administered by the State Courts has yet been made, although demands have been put forward in some quarters for an effort to be made in that direction. A Code issued by the Indian Government would not, of course, purport to be an authoritative statement of the Sacred Law. It would be merely a statement of the rules of the Personal Law of Mohammedans actually applied in the Indian Courts. Thus it would be a Code of Anglo-Mohammedan Law rather than a Code of the Sacred Law. There are divergences between the rule of this Anglo-Mohammedan Law and the rules of the Sacred Law as interpreted by the best Mussulman authorities, and, so far as such divergences exist, the law administered by the Indian Courts rests solely upon the authority of the Indian Government (*k*).

It is at least clear that difficulties exist in the way of codification of bodies of religious law which are not present in the case of purely secular rules. In Europe this conflict between spiritual and secular authorities only exists, if at all, to a very attenuated degree, and the objection that by codification the secular powers might be arrogating to themselves an authority which they do not possess has there no weight.

The question of codification in Europe was brought into prominence by the publication of the French Codes at the beginning of the nineteenth century. Shortly after this event, Savigny published his famous book "*Vom Beruf unserer Zeit für Gesetzgebung und Rechtswissenschaft*" (The Vocation of our Age for Legislation and Jurisprudence), in which he examined the advantages of codification

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(*k*) For the question of codification of Anglo-Mohammedan Law, see Ilbert, "Government of India," pp. 340, 341, and an article by Sir Roland Wilson in the *Asiatic Quarterly Review* for October, 1898, particularly pp. 239-242. Several unofficial Digests of Anglo-Mohammedan Law exist, of which the best known is that of Sir Roland Wilson, first published in 1895.



with particular reference to Germany and pronounced emphatically against its desirability (*l*).

In this work he severely criticized the slipshod character of the French Civil Code, but the principal ground upon which he based his objection to codification was the distorting effect produced by it upon the development of the law. His point of view will be easily understood if his theory of the origin and nature of law is borne in mind. Holding as he did that law was the expression of the popular consciousness, he could not but see in the stereotyped rules of a Code a permanent fetter upon the freedom of this expression.

The French jurists of that period were under the dominance of the theory of natural law. Law in their view was not a body of rules adapted and re-adapted to changing social needs, but a series of logical deductions from absolute and unchangeable principles. It must not, of course, be supposed that this theory was held in its purity by all thinkers. This was far from being the case. But this *a priori* theory of law was undoubtedly in general vogue in France when the Codes were compiled, and it was from this point of view that the Codes were first regarded. It was natural that under these circumstances codification should seem at once easy and indisputably right. And apart altogether from considerations such as these no one would now deny that the conditions of France called for such a unification and authoritative expression of the law.

At the same period, in England, Jeremy Bentham was working for the codification of English law. His point of view was not really dissimilar to that of the French jurists, although he would have substituted the principles of Utility for the Law of Nature as the guiding spirit of the law. He had no eye for historical considerations and little appreciation of the complexity of human nature and of human affairs. He firmly believed that it was possible to compose a body of law free from technical language, brief, and comprehensible by all people. Bentham was indeed essentially a law reformer, and in codification he saw a unique opportunity for lopping off the historical excrescences with which English law was deformed and reducing it to a simpler and more rational state. Austin rivalled Bentham in ardour for the cause of codification. A severe critic

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(*l*) This book was an answer to Thibaut's "*Ueber der Nothwendigkeit der Abfassung eines allgemeinen bürgerlichen Gesetzbuchs für Deutschland*" (On the Necessity for the Compilation of a National German Code). Savigny's arguments effectually checked all movement in the direction of codification. In our own day, however, the publication of a Civil Code for the united German Empire (1896) has realized Thibaut's aspirations.

himself of the deficiencies of the French Codes, he criticized with equal severity the views of Savigny. He admitted that the Code Napoléon might be regarded as a partial failure since it "had not accomplished the primary ends of a Code in the modern sense of the term, that is, a complete body of law intended to supersede all the other law obtaining in the country." The mass of legislation and jurisprudence under which he speaks of the French Code as already buried has increased tenfold since his day, and it is the existence of this extra-Code law which argued for him the deficiencies of the original. But Austin contended not unreasonably that the partial failure of one or two attempts at codification was no proof of the impossibility of the task. The advantages of a good Code were, in his opinion, so great that difficulties ought not to daunt the legislator. It was the greater accessibility and certainty of codified law which attracted Austin, and this in contrast particularly with the English Case Law. The Commissioners appointed by the Sultan to draw up the Ottoman Civil Code expressed the same idea when commenting in their Report upon the condition of the authorities upon which the Mohammedan Law rests. "The sacred jurisprudence resembles a vast ocean at the bottom of which must be sought at the cost of immense effort the pearl therein concealed. Wide experience must be combined with vast erudition in order that there may be extracted from the Sacred Law suitable solutions of all the questions which arise" (*m*).

Austin was not deceived into supposing, like Bentham that codification could render the law so simple as to make it knowable in detail by laymen, but he was no doubt right in thinking that it might be made simpler than it was, and that codification would assist this process.

In his criticism of Savigny, however, Austin exhibits to the full his lack of appreciation of the historical aspect of law. He denominates as "absurd" the argument that a Code is likely to stereotype the law, and can see no sort of objection to codification in the plea that good law is far more the creation of popular consciousness than of the legislator. But here he was undoubtedly wrong. One of his successors in the Chair of Jurisprudence at University College, London, Mr. Sheldon Amos, has well said that the arguments of the historical school against codification are unanswerable, and the real question is not whether any serious loss is incurred by codification, for this may be granted, but whether the general gain is likely to outweigh the loss. This can only be decided by reference to the particular circumstances of each case.

Cases for codification undoubtedly occur when a unification of the

law of a country is desirable, as was the case in France and in Germany, or when a rapidly developing country requires the importation of a new system of law, as was the case with Japan (n).

French writers have noticed the hypnotizing effect which the Code Napoléon exercised over the first generation or so of jurists who succeeded it, an influence which tended to prevent the free development of the law. And, what is of greater interest, it is those very defects pointed out by Austin and others which now seem to be in a fair way of becoming its chief glory. Austin criticized the absence of "definitions of the technical terms and explanations of the leading principles and distinctions in the Code." We are now told that these omissions are the proof of the consummate wisdom of its compilers:—  
*"Le Code Napoléon ne dit pas ce que c'est qu'un droit, et il y est parlé de droits à chaque page ; il ne définit pas la rétroactivité, et cependant il dispose que les lois n'ont point d'effet rétroactif ; il ne nous apprend pas ce que l'on entend par statut réel et statut personnel, et pourtant la connaissance nous en est indispensable ; il n'explique point ce qu'il désigne sous le nom de droits civils, et il établit une distinction très délicate entre les droits proprement civils, dont jouit un étranger, et les droits civils du français ; il crée une série de fictions juridiques, sans définir le mot de fiction ; il protège ou condamne la bonne ou la mauvaise foi, sans donner toujours de ces mots une explication suffisante ; ajoutez à ces exemples une quantité d'autres et vous constatarez que bien des notions fondamentales, requises pour une saine compréhension de la loi, ne se trouvent inscrites nulle part dans cette loi. Les rédacteurs du Code en ont expliqué la raison, Ce sont des principes scientifiques et la loi ne fait pas la science. Elle laisse aux savants la tâche de formuler les meilleures définitions, les axiomes et les postulats"* (o). These omissions, it is suggested, were intended by the legislators because they recognized how necessary it was that the law should adapt itself to the needs of successive generations "*ils ont voulu une science en mouvement, se pliant aux exigences fondamentales de chaque époque, sans principes arrêtés pour toujours.*"

Again, Austin reproached the Code because it did not cover the whole field of law, and this very defect appears to be the cause of special rejoicing on the part of the most advanced school of French legal thinkers.

M. Saleilles in his essay on "*Le Code Civil et la Méthode historique*" in the "*Livre du Centenaire*" seeks to show how baseless is the allegation that the Code checked legal development by quoting case after case in which its vagueness or omissions have left the field open for the jurisprudence.

(n) Amos, "Science of Jurisprudence," p. 478

(o) Mallieux, "L'Exégèse des Codes," p. 32.

Article 1382 is a striking example (p). "*Aucune disposition du Code Civil,*" he says, "*ne s'est plus largement prêtée à cette transformation et n'est plus apte à s'y prêter que la formule si vague et si extensive de l'art. 1382. On pourrait écrire un volume sur la fonction de l'art. 1382 dans le sens de l'orientation nouvelle du droit civil.*" Many examples are quoted by him of happy omissions in the Code the existence of which has afforded the jurisprudence an opportunity of filling the gap with law which really reflects the needs of the day. The liberal interpretation given by the modern French jurisprudence to the text of the Code has enabled it to renew its youth. "*Le Code Civil a évolué : son texte est resté le même mais le contenu qu'il recouvre s'est modifié du tout au tout. Dans les autres que l'on croyait vieilles a coulé le vin nouveau ; et sa vigueur généreuse a suffi pour rajeunir l'enveloppe qui le contenait*" (q) ; a curious use of the Biblical imagery, but none the less expressive of the independence with which modern French lawyers are coming to treat the text of the codified law.

The English lawyer, enjoying the comparative freedom of case-made law, is inclined to applaud his French brethren seeking thus to escape from the fetters of a Code. But one may respectfully suggest that the escape appears to require the loss of the advantages which a Code is expected to secure.

Certainty in the law does not indeed seem to be secured by a Code. If confined to a statement of general principles which must be worked out by the action of the Courts the law is no more certain under a Code than are the principles of English Common Law, which are well understood and beyond discussion. And if it be said that the merit of a Code lies in the provision made by it of rules to govern cases which have not yet occurred, it may be replied that this seeming merit is a source of danger. Indeed I think it may be plausibly contended that unenacted Case Law is more certain than enacted and codified law. If the legislative enactment is regarded as the sole authoritative source of law, the jurisprudence of different Courts may vary indefinitely in its interpretation and it may be long before any tendency towards a uniform interpretation is manifest. But when, as in England, the decisions are an authoritative source of law, the judicial view on a point of law becomes much more quickly "fixed." Nothing strikes so strongly an English lawyer reading French law as the extraordinary uncertainty which exists on points of interpretation. In England a decision of an inferior Court is not of course binding,

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(p) Article 1382 runs as follows : "*Tout fait quelconque de l'homme qui cause à autrui un dommage oblige celui par la faute duquel il est arrivé, à le réparer.*"

(q) "Livres Centenaire," I., pp. 113, 114.

but its very existence is an argument for the final adoption of the view there put forward. It will not be departed from without consideration and without strong reason. It is not often that an English lawyer can quote two contradictory bodies of cases. The English judge does not often decline to follow a previous case. He distinguishes it. In France there seem to be contradictory bodies of cases on most points on which there can be serious controversy. And in Egypt the "jurisprudence" of the Mixed Courts exhibits an abounding variability.

A well-arranged Code may, however, have the advantage of making the law more accessible. Whether laymen will benefit much from this is doubtful. Codes of modern law are couched generally in technical language and the real meaning of many of their provisions would not strike the layman. In perusing a book upon a difficult subject true comprehension of the writer's thought can only be obtained if the reader has himself tried to grapple with the problems with which the book deals. This is often forgotten by young students who suppose that to have read a book and to have understood it are the same. So also of a Code. A Code is usually the work of a body of jurists who have thought much on the problems of law and it cannot be understood unless the reader is also acquainted with the nature of the difficulties which the codifiers have tried to surmount. Still, for lawyers at least, a Code does put the law in a form convenient for reference. To a more limited extent this may be true for laymen also. Laymen do not, indeed, learn much from reading a Code, but they may be thereby instructed on some points of common practice and they will find the codified rule more accessible and the form in which it is stated more comprehensible than if they had to extract it from a bundle of statutes or if it rested upon professional opinion or judicial decision. The Egyptian Codes cannot be very helpful to the layman in this way since they are incomplete and confused and generally require a knowledge of French law for their interpretation. But at worst the layman will find a definite statement upon certain points of law which are likely to arise in the course of his affairs. He is told, for example, that a lessee may sublet in the absence of express prohibition (N. C. C., art. 366), that if a lessee holds over with his lessor's consent, the lease is deemed to have been renewed upon the same conditions for the customary term (N. C. C., art. 386), and that a lease is dissolved by the sale of the thing let when the lease has not a legally established date (N. C. C., art. 389). An English tenant wishing to know his position in these matters would find statements of a similar character in legal text-books. But these statements would rest upon judicial authority and the form given to the rule in an article of a Code is no doubt more acceptable to laymen apart from the fact that the arrangement of the articles in the Code makes reference easier.

## CHAPTER V.

### INTERPRETATION.

THE subject of the interpretation of law, in the broadest sense attached to the term, might be made to include a discussion of all the processes by which the growth of the law and its adaptation to social needs have taken place. In this chapter, however, we are concerned only with the interpretation of enacted law, meaning by this the principles and methods by the application of which the meaning of a written rule is brought to light.

Every person who is in any way subject to a rule of enacted law may have to interpret it. Laymen, indeed, hesitate to interpret rules of law themselves. The law as they know it is mostly in the unwritten form of common understandings, or in the written form of public notices drawing their attention to some special provision. Thus most people in Egypt know that a deed of sale ought to be registered at the Mixed Courts, but few could say where the rule of law to that effect is to be found. And when it becomes necessary to draw the attention of the public at large to the details of some enactment public notices are sometimes sent out and affixed in frequented places so that he who runs may read. For example, we find notices about the close time for birds exhibited on the railway stations in Egypt. But if the layman seldom interprets a rule of law the lawyer must often do so when, for example, he is advising his clients or writing a treatise. So also administrative officials when acting under the law have often to interpret it as best they can. But neither the interpreta-

tions given by lawyers, however eminent, nor those of officials, however high, are authoritative even for the actual case in hand. Thus, if an officer of the judicial police makes a domiciliary search under N. C. Cr. Pro., art. 18, the legal validity of the search is not influenced by the opinion of the officer that the case was one of flagrant delict under N. C. Cr. Pro., art. 8. The officer's civil or criminal liability for an improper search may indeed be influenced by this opinion (cf. N. P. C., art. 58), but the legal validity of the search can be determined only by the Courts who are exclusively competent to make authoritative interpretations of the law. Note, therefore, that the judicial decision is final as to the application of the law to the case tried, though as regards other cases in which the same point of law is raised previous judicial decisions are in Egypt only sources of law in the sense that their existence may influence the Court in deciding the same way too.

In Egypt the Courts and the Courts alone can authoritatively interpret the law. Thus the circulars of the Committee of Judicial Supervision upon points of law are not binding on the Courts. Judges may be influenced by their existence even perhaps to a greater degree than by the decisions of other Courts. But the Committee has no power to interpret the law authoritatively. It is indeed sometimes thought that the views expressed by the Ministry of Foreign Affairs upon a question of nationality are binding on the Courts. But there is no authority for this. In Turkey indeed there exists a special Commission of Nationality set up in 1869, the decisions of which are expressly made binding on the Courts, so that if the question as to the nationality of a person is raised before the Turkish Courts and that person is furnished with a certificate emanating from the Commission, the Courts are bound by the application of the law to the facts which the Commission has made (a). This is not so in Egypt.

(a) Règlement de la Commission chargée des affaires de nationalité, art. 8.

The creation of this Turkish Commission is only one example of the attempts which have often been made and are still made to take away from the Courts of the country the exclusive right to interpret the laws. "*Ejus est legem interpretari cujus est condere.*" (The person who made the law should interpret it.) The maxim is very false as applied to legislative assemblies which change both in personnel and in spirit as the years go on. The legislative authority may indeed reasonably make new laws which formulate more clearly the provisions of an old one. But a true interpretative law is declaratory and applies "retroactively" to facts which have arisen before its promulgation. That such an interpretative law may in exceptional cases be desirable is possible. But that the legislature should as of course take to itself the function of interpretation of the law either by deciding in a disputed case or by *ex post facto* legislation is certainly undesirable. Nevertheless the legislative authority has from time to time exercised this power. Thus after the codification of the Roman Law under the Emperor Justinian, the Emperor forbade anybody to write a commentary upon the new Digest and required that the decision of all doubtful points should be referred to him personally (b). And in this connection it is interesting to note that the highest Court of Appeal in England (the House of Lords) is a part of the legislature, and so also the Court which hears appeals from the Colonies and Dependencies is a committee of the King's Privy Council. - Historically the French *Cour de Cassation* is a development of the ancient *Conseil du Roi*. And at the time of the Revolution vigorous attempts were made in France to secure for the legislative body the final decision in disputed points of law. The history of these attempts is worth notice. By a decree of 27th Nov.-1st Dec., 1790, it was provided that when there was a third *pourvoi* to the Court of Cassation in any case the Court should not hear the application until it had obtained the opinion of the legislature upon the point of law raised, and that it should follow this opinion in its decision (*Référé obligatoire*). By an Imperial decree dated 16 Sept. 1807 this power of interpretation was given to the Emperor in Council. An appeal to him was not obligatory on the second *pourvoi* which was to be tried "*toutes chambres réunies*," but if there was a third *pourvoi* it was obligatory. The better opinion was that the Emperor's interpretation was binding not only for the case in issue but for all future cases. "*Le droit d'interpréter les lois*," it was remarked by the Government orator in introducing this decree, "*ne peut appartenir qu'à l'autorité qui en a pris l'initiative et qui, chargée*

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(b) See Walton, "Introduction to Roman Law," p. 318. But this prohibition does not seem to have been long respected.



*de leur rédaction et de leur proposition, connaît parfaitement l'esprit dans lequel toute la loi est conçue."* This decree was regarded as applicable even after the re-establishment of the monarchy in 1814-1815. But by a law of 30th July, 1828, the power to make a final interpretation was once again given to the Courts, and was put upon its present footing by the law of 1st April, 1837 (c).

Written law is an expression of the intentions of the legislator in the same way as letters or written agreements are expressions of the intentions of the writer or the parties. Similar difficulties are likely to arise in ascertaining the meaning of a law to those which are sometimes experienced in determining precisely what our friend meant by remarks in his letter, or what the contracting parties meant by some clause in their agreement. The primary purpose of interpretation of law is, then, to ascertain the intention of the lawgiver. In order to discover these intentions to others, the lawgiver has used a certain form of words. The words are the key to his meaning, and by them his intention must be judged. If, therefore, these words convey a clear and coherent meaning, we are entitled to assume that to be the meaning which the lawgiver had in view. A judge is not entitled to apply as law that which he thinks the lawgiver wanted to say or ought to have said if the lawgiver has not said it (d). The effect of this general principle, however,

(c) See Garsonnet, "*Traité de Procédure*," Vol. I., §§ 89 ff.; Géný, "*Méthode d'Interprétation en Droit privé*," §§ 44 ff. And for further details, see an article by M. Barthélemy in "*Revue du Droit Public*," 1908, pp. 465 ff. The matter is again referred to below, pp. 221 ff. In this connection and as an example of extra-judicial interpretation, one may mention in Egypt the circulars of the Committee of Judicial Supervision. These circulars have, of course, no binding force and are merely advisory. They supplement the scanty Egyptian jurisprudence and in fact furnish the inferior tribunals with a useful body of "doctrine" emanating from the most instructed source.

(d) The position in Egypt is complicated by the existence of three renderings of the Codes (Arabic, English, and French). Laws also are published in Arabic and in French or English as well. Most of the Codes were undoubtedly originally drawn in French, the Arabic

depends largely upon the extent to which other evidence of the lawgiver's intention is permitted to rank with his written word in determining his meaning. In England it is a well-recognized rule that if the words of a law have any clear meaning, that meaning must prevail, however sure everybody may be that the lawgiver really meant something else but used inapt words to express it. Special sanctity has always there been given to the written word. It is not permitted to the judge to go behind the words if a meaning can be attached to them as they stand. In France, though the same general principle is enunciated (e), it is not applied with the same rigidity as in England. And in Egypt the Mixed Courts in particular have occasionally shown little reverence for the words of the Code when they conflict with or inadequately express French law, the assumption that the Egyptian Codes were intended to introduce French law into Egypt having been sometimes used so as to credit the Egyptian lawgiver with an intention which he has certainly not expressed. For example, under French law a person who has been in possession of land in good faith and with a just title can prescribe in a shorter period than that necessary in the case of a possessor in bad faith (f). The corresponding Egyptian article does not mention good faith as a necessary condition for the

and English renderings being mere translations. Yet among an Arabic-speaking people it is natural to regard the Arabic text of the Native Codes at least as having a certain superior authority. See upon this subject a circular of the Committee of Judicial Supervision in O. B. X., No. 104, where it is laid down with reference to laws that in case of doubt as to the interpretation of the Arabic text it is useful, in order to remove all uncertainty, to refer to the French text as a means of interpreting it. (See also Walton, "Obligations," I., p. 316.)

(e) "*Quand une loi est claire il ne faut point en éluder la lettre, sous prétexte d'en pénétrer l'esprit.*" This maxim was embodied in the original text of the French Civil Code, but was afterwards struck out with the rest of the "*Livre préliminaire.*" See, however, Planiol, I., §§ 216-217.

(f) F. C. C. arts. 2262, 2265.

shorter prescription (*g*), but the Egyptian jurisprudence has in effect added these words to the article (*h*).

When the words of the law are clear as applied to a given case, no serious difficulty, however, arises. The problem of interpretation becomes much more difficult when the words do not convey a clear and complete meaning, such as to put beyond doubt the rule to be applied to the circumstances of the case for decision. The difficulties arising under this head are due either to ambiguities in the words of the law or to inconsistencies, real or apparent, between its different articles.

An example of an ambiguity we may take the wording of art. 9 of the S. O. (Mixed) as it existed prior to 1900. This article provided that the new Mixed Courts should have exclusive jurisdiction in civil and commercial causes not coming within the law of Personal Status between natives and foreigners and between foreigners of different nationalities and further that they should have jurisdiction "in all actions relating to real rights over immovable property between any persons, even persons belonging to the same nationality." Did this provision give jurisdiction to the Mixed Courts in suits relating to immovables when both parties were natives? This depended upon whether the word "persons" in the last sentence of the article was to be interpreted in its ordinary sense as including any person whatsoever, even natives, or whether this sentence was to be interpreted by reference to the previous paragraph as providing (exceptionally) that in suits relating to immovables the Courts would have jurisdiction even between foreigners of the same nationality. Conflicting decisions were given by the Courts and it was not until 1900 that a new Decree promulgated with the approval of the Powers definitely restricted the jurisdiction to actions between natives and foreigners or between foreigners of the same or of different nationalities (*i*).

It must not be supposed that the uncertainty of meaning always appears on the face of the article. Generally, indeed,

(*g*) N. C. C., art. 76; M. C. C., art. 102.

(*h*) For the jurisprudence, see B. L. J., T. D. s.v. Prescription, §§ 3323 ff.

(*i*) See fully Péliissié du Rausas, "Le Régime des Capitulations en Egypte" (2nd ed.), Vol. II.

it is only when some new set of circumstances arises that the difficulty becomes apparent. The law is necessarily couched in general terms, and it demands a fertile imagination and the faculty of great precision of expression to draft an article which will apply exactly even to the less uncommon groups of circumstances which it is intended to regulate. Accuracy of drafting will in the long run save more than the trouble it takes. The meaning of laws carelessly drafted has to be beaten out at the expense of the public in innumerable suits, the necessity for which would have been avoided by a little care in the wording of the law. Unfortunately, careless drafting is by no means uncommon (*k*). In parliamentary countries an additional cause of trouble arises from the necessity of passing the measure through an assembly. Words are added here and there at the suggestion, perhaps, of private members, sometimes to bring out some particular meaning more effectively, sometimes to alter slightly the effect of the law. Even whole sections may be put in to cover some case for which no provision seems to have been made, or to modify the application of the law in certain instances. In making these additions, the attention of the assembly is generally directed to their particular effect, and yet they may unwittingly alter the apparent meaning of other parts of the law. For a law must be construed as a whole, and an addition which to its proposer has but a limited effect may, when placed in the law and read in connection with other parts of it, seriously affect their construction.

In seeking to solve the problems of interpretation which arise in the application of the law to facts various rules or

(*k*) Careless drafting is responsible for many of the difficulties of the Egyptian Codes. The example just given of the omission of the words "in good faith" in M. C. C., art. 102, is probably an example. A still more striking one occurs on a comparison of N. C. C., art. 125, with N. C. C., art. 478. The like inconsistency does not exist between M. C. C., art. 185, and M. C. C., art. 582.

methods are adopted. The presumed purpose of them all is the discovery of the lawgiver's intention, but the assumption that this intention is discoverable is often only a pious fiction. The lawgiver is by it assumed to be a person of one mind, choosing advisedly the terms in which the law is expressed, with full appreciation of their import. As a matter of fact, the form of the law is due to many minds, working sometimes together and sometimes almost independently. The principal results which will follow from the law are intended, but many other results, which follow as certainly from the words used, were not really in the mind of any person responsible for the language employed. Moreover, ambiguities and inconsistencies arise frequently merely from pure forgetfulness or mental confusion on the part of the draftsman. To a limited extent, as we shall see, it is allowable to enquire into the circumstances under which the law was drawn in order to ascertain its meaning, but as a rule what may be called the personal factor in its composition must be ignored for purposes of interpretation. Persons engaged in the interpretation of the law when professedly seeking to discover the lawgiver's intention really ask themselves what a person writing with knowledge of the existing law and with reference to existing conditions would probably have meant by the words used. Indeed, the standard by which the words of the law are generally interpreted is rather the mind of the "reasonable lawyer" than that of the many-headed lawgiver (l).

As just mentioned, a law must be looked at as a whole, and each part thereof interpreted consistently with the others. This co-ordination of texts is a process of great importance

(l) Compare the remarks of Mr. Gray, *op. cit.*, § 379: "Is not the true rule that the judge should give to the words of a statute the meaning which they would have had if he had used them himself unless there be something in the circumstances which makes him believe that such was not the actual meaning of the legislature?"

and gives rise to much subtlety and ingenuity, more particularly in dealing with a Code. Instances of the process are numerous in the history of the French Civil Code. It frequently reveals hidden ambiguities of expression and thus brings to light the real "intention of the lawgiver." As an example from the Egyptian Codes (*m*) we may take the co-ordination of arts. 46, 86, 87, and 607 of the Native Civil Code, which determine the position of a possessor in good faith of movables (*n*). In the interpretation of the Egyptian Codes, however, another factor is continually present. These Codes having been derived from the French, they are frequently looked upon as but a partial expression of French law, and the connection between the various articles is suggested rather by the preconceived French notions than by arguments based on the words of the Codes themselves (*o*).

The complete exegesis of the Codes demands not only a co-ordination of the texts, but a determination of the meaning to be attached to words. Sometimes the law itself provides a definition of terms which it uses. In England, for example, there exists an Act known as the "Interpretation Act" (*p*), which contains legislative definitions of many terms frequently used in Acts of Parliament, and, in addition to this, special interpretations of particular phrases are often embodied in the Acts in which they occur. The practice appears to be less common in France and Egypt (*q*), where definitions of abstract legal ideas are, however, not unusual. Thus the

(*m*) For some French examples, see Gény, "Méthode d'Interprétation en Droit privé," § 102.

(*n*) M. C. C., arts. 68, 115, 116, 733.

(*o*) An interesting example is furnished by a case reported in Gaz. Trib., V., No. 391, in which the Commercial Court of Cairo was called upon to interpret the cryptic articles 188-200 of the Mixed Commercial Code which are supposed to relate to cheques. See an article upon this decision by M. Castro, Gaz. Trib., V., pp. 183-184.

(*p*) 52 & 53 Vict. c. 63.

(*q*) See, however, N. C. C., arts. 1, 2; M. C. C., arts. 16, 17.

Native Civil Code tells us what it means by ownership (art. 11), by a servitude (art. 30), by an obligation (art. 90), by sale (art. 235), and so on (*r*).

For the most part, however, the words of the law must be explained by the jurist or judge by reference to established usage, practical needs, and the underlying purpose of the law. Take for example the word "fault" (*faute*), which occurs in art. 151 of the Native Civil Code, or "damage," occurring in the same article and in arts. 152 and 153. No definition of these words is to be found in the Codes themselves. Art. 151 tells us that any act of man causing damage to another imposes a duty of reparation upon the person by whose fault it was caused. Let us suppose that Ahmed opens a shop opposite a similar shop kept by Zaky, and seeks, by profuse advertising and cutting prices, to draw away Zaky's customers. It is well established that Ahmed owes no reparation, though his action may result in Zaky's bankruptcy, yet in a popular sense the damage was caused by Ahmed's fault. Art. 153 provides that the owner of an animal or the person who is using it is liable for the damage caused by the animal which he has under his charge. Suppose, that Wombwell, a menagerie keeper, brings his animals to Alexandria and parades them through the streets. Little Ahmed, who has never seen an elephant before, is so frightened on hearing it trumpet, that he shrieks with terror, has a convulsion, and is seriously ill. Would this be damage done by the animal within the meaning of the article? The words of the law throw but little light on such questions, which have to be resolved by reference to ideas of fault and damage already established.

Indeed, the Codes imply the existence of a body of

(*r*) When the law itself provides the interpretation of the words it uses the interpretation is said to be "legal." For a discussion of the effect to be given of a definition in the law of a legal idea, see Géný, *op. cit.*, § 101.

established notions without a comprehension of which they would become meaningless. Many of these are not defined, but are nevertheless treated as if their actual import were fully understood. Such, for example, are good faith, agreement, possession, domicile, capacity. In interpreting the words of the lawgiver his knowledge of their existence and of the conclusions to which their use leads, is assumed. These juridical conceptions, as they may be called, constitute in reality the conditions for the existence of legal rights and duties, and form, consequently, the foundation upon which the legal superstructure is raised.

Interpretation, so far as at present explained, is a process by which the application of the law to the facts of life is elucidated by a study of the terms of the law itself (s), without reference to any evidence as to the lawgiver's intention other than that supplied by the law.

The words which the lawgiver has used are not, however, by any means the only existing evidence of the intention which he sought to express by them, and the case may arise in which it is desirable to have recourse to evidence outside the law in order to arrive at a true appreciation of the lawgiver's meaning.

This extrinsic evidence of intention (t) may be supplied by a consideration of the nature of the evil or difficulty which the law was intended to remedy, which will permit the words of the law to be construed in the light of its purpose. An

(s) When the meaning of the law is sought in the words of the law itself the interpretation is sometimes said to be "grammatical." When the law itself is insufficient to exhibit the intention of the legislator, and recourse has to be made to extrinsic circumstances to explain the meaning, the interpretation is termed "logical." (See Géný, *op. cit.*, §§ 14, 15, and cf. Holland, Chap. XVIII. p. 419.) These terms are not, however, in common use.

(t) Oral evidence as to the meaning of a statute is not admissible to explain the statute. This, at least, has been so decided in England (*Marquis Camden v. Commissioners of Inland Revenue*, 83 L. J. (K. B.) 509).



example of this is afforded by a recent English case (*u*) concerning the interpretation of the law which requires bicycles to carry a lighted lamp between the period from one hour after sunset to one hour before sunrise. The sun in England does not set at the same time in every part of the country; thus, in Cornwall it sets a quarter of an hour after it has set in London. The question was raised whether Greenwich time or local time was to be used in determining whether or not an offence had been committed, and the Court decided that local time was to be employed, since the object of the law was to prevent danger to traffic occasioned by persons riding in the dark, and this made actual sunset the proper criterion.

In such cases it is clear that there is a very direct reference to the actual intention of the lawgiver. This is even more distinctly the case when French writers go back, as they often do, for purposes of interpretation, to the *Travaux préparatoires* (*x*). These may be summarily described as the documents accompanying the drawing-up of the law. They consist of drafts of the law in its various stages, reports of the discussions in the Chambers upon it, reports of committees, and the like. The "*travaux préparatoires*" of greatest importance are those which accompanied the compilation of the Code Napoléon (*y*), and these have been much used in interpreting the Code. From the reports it is often possible to ascertain what was in the mind of the persons who gave form to the law when they used particular words, and it is assumed that the lawgiver's intention was to give effect to their thought (*z*). In England, reference to discussions in the

(*u*) *Gordon v. Cann* (1899), 80 L. T. (N. S.) 20.

(*x*) For the "*Travaux préparatoires*" and their use, see Planiol, I., § 218, and note, Capitain, p. 79.

(*y*) The "*travaux préparatoires*" to the Code Napoléon are to be found in Loaré, "*Législation civile commerciale et criminelle de la France*" (1827-1832).

(*z*) For an example of this, see the interpretation of F. C. C., art. 206, discussed in Planiol, I., § 667.

Houses of Parliament for purposes of interpretation is not allowed, a peculiar sanctity being attached to the written words as they stand, extrinsic evidence of this kind as to what the legislator meant not being allowed to interfere with the apparent meaning of what he has said (a).

In Egypt, circumstances have prevented the creation of *travaux préparatoires*. The original Codes were drawn up in a hurry at one stroke, and there is nothing to indicate what was in the draftsman's mind when he abbreviated, altered, or made omissions from the French Codes in compiling those of Egypt. Two Native Codes have, however, been reissued, those namely relating to criminal law and the law of criminal procedure. The new Codes were accompanied by an Explanatory Note (*Note Explicative*) in French and Arabic, which sought to explain the nature of the principal changes made in the law. The Note was originally submitted to the Council of Ministers for their information, but has since been published. Together with the provisional drafts of the Code

(a) Upon the difference between the French and English rule in this respect, see Walton, "Scope and Interpretation of the Civil Code of Lower Canada," pp. 103 ff. A very recent English case, *Webster v. Terry*, October 20, 1913, illustrates this. A provision of the Motor Car Order, 1904 (made under statutory powers by the Local Government Board), required that all "motor cars" carry a red light behind, but there was an express exemption in favour of "bicycles." It was admitted that motor bicycles were motor cars within the meaning of the Order, but it was claimed that they were included within the term bicycles and were therefore exempt. The appellant wished to read a circular of the Local Government Board issued in 1904 and showing that the Board interpreted the exemption to cover motor bicycles, but the Court declined to hear it. "We are not entitled," said Mr. Justice Scrutton, "to look at any statement of what the framers of the regulation meant." In the event, the Court held (Bailhache and Ridley, JJ. ; Scrutton, J., dissenting) that motor bicycles were not within the exemption, which referred to ordinary bicycles only. The case is also interesting as illustrating the unfortunate result which may follow, in my opinion, from deviations by the judges from strict canons of interpretation.

and with other official indications of the tendency of the preparatory discussions, contained more particularly in the Judicial Adviser's Reports, it affords assistance in interpreting the terms of the Codes of the same kind as that afforded by the French *travaux* (b). Of the same character are the reports of the discussions before the old Legislative Council and the Legislative Assembly at the time when new laws were submitted for their criticism. These are to be found in annexes to the Official Journal.

The *travaux préparatoires* take us, as it were, behind the scenes and enable us to watch the law in the process of formation—a valuable privilege if we desire fully to understand the purpose of its makers. For every word in a carefully drafted statute was pregnant with some definite meaning to the person who originally suggested it.

In order to enter adequately into the thoughts expressed by the words of the law, it is necessary that it should also be studied as an historical document—as reflecting, that is to say, the ideas of the time at which it was compiled. This is a consideration of greater value when we are dealing with long-established Codes, such as those of France, than in connection with comparatively modern compilations like those of Egypt. In Egypt it is the historical precedents of the Codes which are of supreme importance, and as to the influence of these upon interpretation a few remarks are necessary.

Although each new law and each new Code appears in the form of a direct product of the lawgiver's mind, it frequently happens that not only the ideas which the law expresses, but the very words of the law itself, are not new. The Code Napoléon was, as has been already pointed out, for the most part a restatement of law which already existed. This is peculiarly the case with the Egyptian Codes. In these there

(b) As to the *travaux préparatoires* to the new Penal Codes, see Grandmoulin, "Droit Pénal égyptien indigène," Chap. I., §§ 77-87.

is little that is original or even native in character, being, as they are for the most part, borrowed from the French (*c*). By this is meant, in the first place, that the general structure of the law is French, and with rare exceptions juridical conceptions are given a like place and a like value to that which they have in French law. But it is also true that the very wording of the articles in the Egyptian Codes follows sometimes exactly, and still more frequently with but minor alterations, the language of the Codes of France. Now since this is the case, it must be assumed that the lawgiver intended that the Egyptian articles should have the same meaning attached to them as has been attributed to their French originals, and thus it comes about that French doctrine and jurisprudence is of pre-eminent importance in interpreting the Egyptian Codes (*d*).

In all that has been said up to the present the assumption has been that the lawgiver has sought to lay down some rule to govern the question at issue and the process of interpretation consists merely in discovering what that rule is. In many cases, however, it must be frankly admitted that the law is incomplete and that the lawgiver has failed to make provision where provision is required. Yet a judge cannot

(*c*) Certain institutions, such, for example, as that of Pre-emption, are borrowed from the Mohammedan law. The new Native Penal Code, 1904, is also far less French in character than was the original Code of 1883, the compilers having sometimes borrowed from other foreign Codes (and particularly from the Indian Penal Code), and at other times exercised their own originality.

(*d*) Of course, when the article in question has its origin in Mohammedan law or in some foreign system other than the French, it should be interpreted by reference to the law of its origin. Cf. the rule which is laid down with reference to the hybrid law of Lower Canada. "When a provision is derived from French law it is to be interpreted by reference to French authorities, and when it is derived from English law by reference to English authorities." Walton, *op. cit.*, p. 130.

refuse to adjudicate on the ground of the silence or insufficiency of the law (e).

We are now, indeed, outside the scope of interpretation proper, and, in the discussion of the methods of law-making employed in the absence of the written word we might easily stray into the paths of legal history. All that it is desirable to say upon this point has been already said in the third chapter, and it is only necessary here to consider the use of one process employed by lawyers in dealing with cases to which the lawgiver's attention does not appear to have been drawn. This is the process known as the argument by analogy. The argument may be presented as follows. The lawgiver must be assumed to legislate according to general principles, and of these general principles certain particular applications alone are contained in the written law. When a case arises which does not fall within these particular cases the judge may nevertheless assume that, if it had presented itself to the lawgiver's mind, the solution which he would have given would have been in accordance with the general principle involved in the cases actually dealt with. By applying the general principle to the new case the judge will, therefore, be giving effect to the intention of the lawgiver, although that intention is nowhere expressed. In effect the judge ascertains the probable answer of the lawgiver to the new question which has presented itself by a consideration of the answers which he has given in cases which present fundamentally the same

(e) Cf. F. C. C., art. 4: "*Le juge qui refusera de juger, sous prétexte du silence, de l'obscurité ou de l'insuffisance de la loi, pourra être poursuivi comme coupable de déni de justice.*" But it hardly needs a written text to postulate a rule obviously grounded on the common understanding of the judicial function. The judges are expected to administer justice. The Swiss Civil Code (art. 1) boldly says: "The law is to be applied to all legal questions for which, by its words or their legal interpretation, it contains a provision. If no provision can be found, the judge shall decide according to customary law, and where such law is also missing he shall adjudicate according to a rule which he would lay down as a legislator. In this he follows approved doctrine and tradition."

problem. The principle involved in the cases actually dealt with is discovered by the use of inductive argument, and when thus obtained it is applied deductively to the new case (*f*). The process is termed Analogy (or likeness) because of the essential similarity which exists between the cases upon which the argument is founded and that to which the principle is extended. To carry out this method effectively is to secure the systematic development of the law. To apply it correctly, it is, however, necessary that the principles which underlie the law should be clearly understood. The great value of doctrinal writers consists in their exposition of these principles, and it is especially through this exposition that professional opinion in France has influenced the development of the law.

In arguing by Analogy it is, however, necessary to make sure that the case to which the law is extended is indeed similar to the one for which the legislator has made provision. Let us take as an example of a disputed argument by analogy the interpretation of art. 7 of the Ottoman Law of Nationality of 1869. This article provides that an Ottoman woman who marries a foreigner may, if she becomes a widow, recover her Ottoman nationality by making a declaration to that effect within the three years which follow her husband's decease. Now, observe, that this provision does not expressly say that an Ottoman woman marrying a foreigner takes her husband's nationality, but it implies it and this is the interpretation generally adopted. Assuming for our present purpose that this interpretation is correct, let us suppose that the converse case is raised before the Courts. A Christian Ottoman marries a woman of (say) French nationality. Does his wife become an Ottoman subject? We are dealing here with a point of Ottoman law only. Whether according to French law the woman loses her French nationality depends upon the provisions of the French laws of nationality and with these we are not now concerned. The woman might remain a French citizen according to French law and yet obtain Ottoman nationality according to Ottoman law.

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(*f*) See Gény, *op. cit.*, § 16. Comparison may be made with the method of the interpretation of Precedent in England, as to which see Pollock, "The Science of Case Law" in "Essays in Jurisprudence and Ethics," pp. 246 ff.

In this case the argument by analogy might suggest that the legislator intended to adopt the general principle that a woman followed the nationality of her husband, and that by impliedly providing to that effect in one case he gives us good reason for supposing that he would, had he cared to make provision for it, have adopted the same principle in the converse case also. This conclusion was indeed reached by the Mixed Courts in the well-known case of the lady Zohrab (*g*). But in later cases before the Mixed Courts (*h*) it has been decided that a woman of foreign nationality marrying an Ottoman does not become an Ottoman subject. The argument by analogy, it was said in one of these recent cases, cannot here apply since there is a vital difference between the case for which provision is made in the law and the case to which it is proposed to assimilate to it. For Mohammedan law does not permit a Moslem woman to marry a Christian. Therefore it must be inferred that art. 7 of the Ottoman Law of Nationality does not refer to the Moslem society in the Ottoman Empire but only to Christians and Jews who are Ottoman subjects and not under foreign protection. Consequently it is not possible to assume from art. 7 that a rule which refers to Christians and Jews should be applied by reciprocity to Moslem families seeing that such an application would have the effect of modifying the personal statute of a Moslem. The conclusion, therefore, must be that the principle that a woman follows the nationality of her husband ought not to be applied generally in Ottoman law.

Again, as the argument by analogy rests upon a presumption that the legislator would have made a similar provision for cases not mentioned in the law, had they presented themselves to him, it cannot be used if the circumstances indicate that the express provision made is exceptional. In such a case the argument *a contrario* will be more appropriate. If the legislator has thought it necessary to provide specially for one case, may it not be inferred that this case is exceptional and that in other like cases the contrary rule must be adopted. And a difference of opinion may easily arise as to whether some particular provision is exceptional so as to justify the argument *a contrario* or illustrative so as to lead to an argument by analogy.

The argument by analogy needs, moreover, to be handled with circumspection. It must not be used to add to but only to complete the law. As Professor Salmond points out, the

(*g*) B. L. J., XXII., 122.

(*h*) Gaz. Trib., II., pp. 162, 163. By a more recent decision (Gaz. Trib., V., No. 120) the Mixed Court has returned to its earlier view.

argument is not admissible merely on the ground that " had a certain case been brought to the notice of the legislature the statute would have been extended to cover it ; so long as it is logically complete and workable without the inclusion of the case, it must stand as it is " (i). If a law is made requiring bicycles to carry lights and in common sense the requirement should be extended to carts also, this is the affair of the legislature, not of the Courts. It may be added that the argument by analogy has been used, sometimes unwisely perhaps, to extend the rules which govern one juridical conception to another which presents apparent similarity. Thus joint and several creditors are regarded as agents for one another, and *stipulation pour autrui* is often explained as a form of *gestion d'affaires* (k).

The French character of the Egyptian law limits its unfettered development by a process of analogical reasoning no less than it checks its interpretation upon independent lines. The Egyptian judge called upon to deal with a case not specifically dealt with in the Codes turns naturally to French law for assistance. Unless there is something in his Codes which prevents the application of the French principle, he is content as a rule to apply French law, the assumption being made that the Egyptian Codes are not only to be interpreted in the light of the French law which they reproduce, but that when they inadequately express that law the gap is best filled by the introduction of the French rule, this being the intention of the lawgiver. The assumption is presumably a sound one, but its effect is to keep Egyptian legal development strictly along French lines.

(i) Salmond, p. 142.

(k) N. C. C., arts. 108, 137. As to the extension of these juridical conceptions to cover cases not properly within their scope, see Géný, *op. cit.*, §§ 73, 74. The author in these paragraphs points out very forcibly the petrifying effect of the process upon the development of the law.



Before leaving this subject it will be well to note the existence of certain modern French tendencies in interpretation based upon views of a very different character to those generally accepted. According to the traditional view the aim of interpretation is the discovery of the intention of the lawgiver, and its results are consequently subordinated to this. To apply this principle honestly means that the Code must be interpreted solely by reference to the subjective intentions of the lawgiver, which gives them necessarily one definite meaning for all time. This meaning indeed cannot be always supposed to have been present to the mind of the lawgiver upon making the law, but it is obtained by a rigid process of reasoning based upon the words he has used, the assumption being that in the Code will be found solutions of all questions which arise, or at least indication of the principles according to which the lawgiver willed that those cases not particularly dealt with by him should be decided. The Codes and the Codes alone became, therefore, the source of all the law (1).

The artificial character of this theory becomes more and more manifest as the years roll by since the Codes were promulgated. Problems arise which cannot by the wildest imagination be believed to have been foreseen by the lawgiver; problems based on facts of a social life and changes in the structure of society beyond the scope of the most keen-sighted observer contemporary with the Code itself. Life changes, and with it the law must change. The activity of the lawgiver, of course, itself provides solution for many of these problems. The materials of all the French Codes have undergone much alteration since their promulgation at the beginning of the nineteenth century, and added to them is a mass of further legislation growing yearly in bulk.

But legislation is but a blunt instrument for effecting that delicate orientation of the law to new needs which is demanded if it is to perform its social function. Just as the individual placed in a new environment changes imperceptibly his habits and views and is bound so to change if he is to live harmoniously with it and contentedly with himself, so the law will surely though imperceptibly change with changes in social life and social ideals. Will not then the rigid deductions of the traditional theory of interpretation prove a fetter upon this necessary development, and without being able entirely to prevent it yet, by their restricting influences, tend to make it one-sided and incoherent? It would seem so.

Such is the line of thought which has led various eminent jurists

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(1) Cf. the famous remark of Buguet, "*Je ne connais pas le droit civil; je n'enseigne que le Code Napoléon.*"

both in France and Germany to criticize the idea of interpretation generally taught in the schools and accepted in the Courts. The views put forward by these writers are not entirely in agreement (*m*). Some seek to secure the necessary adaptability in the law by restricting the scope of the written words of the Codes to the precise case with which they deal, leaving as wide a range as possible outside the Codes for the influence of more flexible instruments of law-making custom, jurisprudence, and scientific opinion. This is a view which presents considerable similarity to English theory. Others seek by a more liberal construction of the Codes to adapt them to the new needs which they are called upon to meet. Abandoning both the reality and the fiction of the lawgiver's intention, they aim at interpreting the Codes in the light of the actual facts of life. Viewing the Codes objectively and quite separate from the will which produced them, they reconstruct their meaning in a modern light. It must be confessed that this reconstruction is often inspired by theories personal to the author, who is apt to read into the Code not only that which was never meant to be there but that of which his ingenuity alone makes plausible the existence. The maxim adopted as the battle-cry of these thinkers is "*Par le Code Civil, au delà du Code Civil,*" or "*Au delà du Code Civil, mais par le Code Civil,*" a maxim indicating loyalty to the Code with the claim of freedom in its treatment (*n*).

Whatever faults may be found with the somewhat drastic treatment sometimes accorded to time-honoured interpretations in virtue of this cry, there can be no doubt of the reinvigorating effect upon legal development of the attitude of mind which it expresses.

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(*m*) See Géný, *op. cit.*, §§ 96-98, for a brief and lucid statement.

(*n*) M. Saleilles' preface to the work of M. Géný is an admirable apology for the liberal school of interpretation.

## CHAPTER VI.

### THE CLASSIFICATION OF LAW.

THERE are at least two accepted classifications of law. The one is based upon the Public or Private character of the relations regulated by the law, the other upon the fact that some of these relations have reference to things which are their objects and others concern persons alone. The latter is perhaps the more scientific in character, but its application to the whole body of the law destroys the significance of time-honoured distinctions which are also in actual use. The classification of law into public and private is, moreover, that most usual in France. There need therefore be no hesitation in accepting this division as the most radical and convenient (*a*).

### PUBLIC AND PRIVATE LAW.

This classification was employed by the Romans, who defined Public law as the law relating to the welfare of the Roman State and Private law as that which concerned the welfare of individual citizens (*b*). This statement roughly

(*a*) Austin subordinated the divisions of Public and Private law to that of the Law of Persons and the Law of Things. He considered Public law to be only a subdivision of the Law of Persons, since it contained a statement of the special rights and powers of public persons (Lect. XLIV.). Dr. Holland, on the other hand, upholds strongly the radical character of the time-honoured distinction ("Jurisprudence," Chap. XV., pp. 361 ff.). Its universal use by Continental jurists makes it imperative in Egypt. For detailed discussion and criticism, see Korkunov, "Theory of Law," Bk. II., Chap. III.

(*b*) Just. Inst. I., 1-4. See further as to the Roman distinction, Walton, "Historical Introduction to Roman Law," pp. 348 ff.

indicates the scope of these two different kinds of law, but a more detailed examination of the use of the terms is desirable.

Public law regulates the constitution of the supreme and subordinate authorities of the state, whether legislative, executive, or judicial, and the methods of the operation of each. It includes also the rules governing the relations of the state authorities in an administrative capacity with private individuals. Whenever the state acts as the representative of the community as a whole, the rules determining its action form part of Public law. Private law, on the other hand, is concerned primarily with the relations of private individuals among themselves.

Public law is usually divided into Constitutional law, Administrative law, and Criminal law. Private law includes the whole of the Civil law. The Civil law in its widest sense includes Commercial and Maritime law, which are nevertheless usually separated from it on account of their special character. The rules of Private International law may also be included under the head of Civil law, but in this case also a distinction is generally drawn for convenience sake. On the other hand Public International law, if it is to be classified at all, must be regarded as a branch of Public law.

Each of these bodies of law may be divided into two parts. Each contains rules of "substantive" law which define the rights and duties of the persons subject to it and also rules of procedure, sometimes termed "adjective" law, defining the ways in which these rights may be exercised and enforced. This distinction runs through the whole law though it is of greatest importance in the Criminal and Civil law. In the case of Constitutional and Administrative law the definition of the powers of the constitutional and administrative authorities so often necessitates as part of the definition a statement of the procedure by which such powers can be exercised, that any division between the two is inconvenient. Thus

the Municipal Council of Alexandria is an administrative body and the rules as to its constitution form part of the Administrative law. But it possesses powers of administration only when acting according to certain procedural rules. These rules are, therefore, part of its constitution, and a distinction between the substantive law of its constitution and its rules of procedure is hardly feasible.

In the case of Civil and Criminal law, however, the distinction between the substantive and the adjective law is more clearly marked, although even here it is not always easy to say whether a particular rule defines the conditions of a right (c) or prescribes the method of its enforcement. The law of procedure contains the rules as to the constitution and jurisdiction of the Courts, the forms which must be adopted in bringing a suit before them, the conduct of preliminary proceedings and of the trial, the forms and effect of judgment and of appeal, and the methods of execution. Under the law of Procedure may be also placed the rules of Evidence, *i.e.*, the rules which determine the means by which facts may be proved in the Courts.

Further reference to the law of Civil and of Criminal Procedure will be made in dealing with these two departments of law.

### CONSTITUTIONAL LAW.

Constitutional law defines the form of the state, determines the organs of its government, and fixes the limits of the powers accorded to each. The state is a body of persons organized for political purposes. It is necessary to ascertain what persons are members of this body, over what territory its power extends, and in whom the power which the state exercises is vested. • When the state is not independent, or

(c) Thus there is difference of opinion as to whether the rules of prescription which determine within what time a right can be enforced by action are procedural.

forms part of a larger whole, its relation with the suzerain mandatory or protecting power or with the other component parts of the whole must be defined. All of these matters enter into the constitution of the state and are treated under the head of Constitutional law.

It will be remembered that Austin regarded the Constitutional law of a country as partaking rather of the nature of political morality than of Public law. For the rules which determine in whom the supreme power is vested must theoretically exist before the law which the supreme power makes can be treated. But although it is obvious that the rules which determine in whom the sovereignty shall reside cannot be themselves imposed by the sovereign, we are entitled to treat such rules as law, as also those which impose limits upon or subject to an established procedure the action of the supreme state authorities. Organized coercion here fails, and we are left to the self-help of the community to secure, in the last resort, obedience to these rules, but in every other respect constitutional rules bear the mark of law.

In countries in which there exists a written Constitution created by a National Assembly the provisions of the Constitution are, indeed, in the strictest sense rules of law, for the National Assembly must be regarded for this purpose as the actual sovereign. The difficulty is more acute when the powers and constitution of the supreme legislative and executive bodies are conferred not by a written document but by long-established precedent. This is the case in England, but, as already pointed out, it would be a straining of words to deny the character of law to such a principle as (for example) that laws cannot be made without the consent of King, Lords, and Commons. Indeed, in England the distinction between Constitutional rules which are law and those which are not law is well recognized. In the Budget controversy of 1910 both parties admitted the legal right of the Lords to reject the Finance Bill, but while the Liberal

party claimed that constitutionally they had no right of rejection unless, possibly, the terms of the Bill were on the face of them the work of a demented House of Commons, the Conservative party claimed that the right was constitutionally exercised whenever any serious change in the financial system was proposed.

In Egypt the original Organic Law of 1st May, 1883, was the decree not of a National Assembly but of a previously autocratic sovereign. The Khedive thereby voluntarily set limits to his own powers acting in what he believed to be national interests. That he could annul what he created and assume again his unfettered power to legislate and to impose taxes might be argued as an abstract legal proposition; but such action would be regarded as unconstitutional in the sense that it would be forbidden by political morality though not by any rule of law. By the new Organic Law of 1st July, 1913 (Law 29 of 1913), the Khedive of his own motion repealed the Organic Law of 1st May, 1883, and created a new constitutional body (the Legislative Assembly) in place of the Legislative Council and General Assembly. That his action here was perfectly constitutional cannot be doubted. Art. 8 of the Organic Law of 1883, indeed, provided that no new law should be promulgated until it had been submitted for the opinion of the Legislative Council. But this could only apply to laws promulgated under the Constitution of 1883. There is nothing to suggest that the Legislative Council was itself given any form of constitutional control over its own existence. It was not in any sense given the authority of a National Assembly (d).

But, in truth, the question as to whom is delivered the

(d) Prior to 1914 Egypt formed part of the Ottoman Empire, and the Firmans which defined the relation between the Khedive and his suzerain, the Sultan of Turkey, undoubtedly formed part of the Constitutional Law of Egypt. Egypt is now separated from the Ottoman Empire, but her relation to Great Britain, by whose act the separation was effected, has not yet been definitely established.

power of altering the Constitution of the state, though one of great importance from a purely legal point of view, falls into the background when there is a general demand for serious Constitutional change. The constitution and authority of the supreme powers must rest ultimately upon the active will or, at least, the acquiescence of the majority of the people. They constitute the point of attack in any popular uprising and form therefore, so to speak, the bulwarks of the law. The weakness which this position gives to Constitutional rules makes it desirable, if possible, to give them a special sanctity. The Constitution being outside the law is regarded as more sacred than the law. And one consequence of this is the inclusion among Constitutional principles of certain fundamental rules of law to the maintenance of which special importance is attached. Such, for example, are the rules which guarantee to citizens liberties regarded as essential for the individual, such as liberty of opinion, liberty of the person, and freedom from arbitrary taxation. In the long conflicts between the sovereign and the people in England and in France which have issued in the democratic states of to-day these liberties formed the real prize of victory and have been, therefore, enshrined among the unchangeable principles of the Constitution. In England Magna Charta (1215), the Petition of Right (1627), the Habeas Corpus Act (1679), and the Bill of Rights (1689) are regarded as Constitutional documents.

And upon examination a very sound reason appears for describing as constitutional those fundamental rules which limit the discretion of the sovereign and provide the procedure by which the legality of his acts may be tested. It is fundamental for the establishment of legal order within the state that the state authorities should themselves be bound by the law. Law, as Ihering puts it, must be bilaterally binding. The subordination of the people to the law may be granted ; but there must be also self-subordination on the part of the state authority to the laws which it has made. So, when the



English people required their monarch in 1689 to accept the Bill of Rights which lays down the principle that the king has no dispensing power, *i.e.*, has no power to direct that the law is not to be applied in such and such cases, they were forcing the sovereign to acknowledge the supremacy of the law, and in accepting the Crown upon these terms William III. admitted his subordination. All such limitations of the will of the sovereign are essentially constitutional, and their guarantee is precisely the same as that which secures the maintenance of the state authority itself (*e*).

#### ADMINISTRATIVE LAW.

The term Administrative law is not often used in England. It may, however, be taken to cover the subjects treated of under the head of "*Droit Administratif*" in France. The boundary line between Constitutional and Administrative law is hard to define.

M. Aucoc defines Administrative law as concerned with (1) The constitution and relations of those organs of society which are charged with the care of those social interests which are the object of public administration, by which term is meant the different representatives of society among which the state is the most important, and (2) the relations of administrative authorities towards the citizens of the state (*f*). This definition, though too broad in character, has at least the merit of emphasizing the fact that administrative law deals both with the constitution and functions of the administrative authorities, and with the special rules (if any) regulating their relations with citizens. M. Berthélemy distinguishes Constitutional law as concerned with the political organization of the state from Administrative law which analyses the mechanism of the Government machine (*g*).

(*e*) See "Der Zweck im Recht," Chap. VIII., § 11

(*f*) Quoted in Dicey, "Law of the Constitution."

(*g*) "Traité de Droit Administratif" (3rd ed.), p. 2.

In studying Administrative law we learn how the state actually carries on the government of the state, while Constitutional law teaches us only how the state is organized as a political entity for the performance of its primary duties of defence and the maintenance of internal order.

The sphere of Administrative law includes the methods of the application of government to the everyday life of the people.

Starting with the organization and functions of the supreme Executive authorities it includes next the methods of administration such, for example, as the rules relating to the collection of the revenue, the organization of the military and naval establishments and of the police, the management of state property, the control of irrigation, the regulation of trade and of public establishments, the control of charities, and the organization of education. For Egyptian purposes may be added the rules determining the peculiar position of foreigners and the privileges thereby accorded to them, for these limit the powers of the Government (*h*). Under Administrative law are also placed the rules determining the organization and powers of the subordinate and local organs of government which are the means by which the Central Government reaches down to the daily life of the people. These are of very different kinds. In a country such as England, where the government has always been decentralized, most of them are popular in character, and within the scope of their powers have almost absolute liberty. In France government is more centralized, though the movement in favour of decentralization has during the past

(*h*) So far as these privileges do now or may in future rest upon treaties entered into between Egypt and other states, their foundation is to be found in an obligation under International Law. In such countries as Palestine in which foreign privileges are merely matters of grace this is, however, not the case. In any event the recognition of such privileges results in the creation of special administrative rules by which they are made effective.

century been very marked. The administration of every French department is, however, subjected to the general control of an official known as the *Préfet*, who is, primarily, a representative of the Central Government. His office corresponds to that of the *Mudir* in Egypt. But each department in France has also its *Conseil Général* and each municipality its *Maire* and *Conseil Municipal*, all of which are popularly elected. These are represented in Egypt by the Provincial Councils. But Egyptian administration is even more centralized than is that of France.

The principle of separation of powers is held in France to involve the freedom of the administration from judicial interference. It follows that a person who wishes to institute a claim against the administration or its representatives in respect of administrative acts done by them in breach of his private rights cannot prosecute his suit before the ordinary Courts, but must apply to the administration itself for redress. To permit recourse to the Courts would be to subject the administration to the control of the judicial authorities. The civil rights and liabilities of private citizens in their dealings with officials as representatives of the state are thus determined not by the ordinary Courts but by Courts composed of officials. There exist in France Administrative Tribunals which are staffed by officials, and it is before these that claims against the administration are adjudicated. At first sight this arrangement appears to give arbitrary power to the executive authorities since they not only apply the law but decide whether it has been rightly applied. In reality, however, the French Administrative Courts, though composed of officials, are by no means mere instruments of the executive departments and exercise a very beneficial scrutiny over administrative acts in the interest of the private citizen. During the century of their existence they have built up a body of law based on Precedent to which appeal can be made. The history of these Courts is one of great interest. Originally

established by Napoleon to secure administrative freedom from judicial control, they have gradually become a bulwark of public liberty, and the respect in which they are held in France to-day is very high. Recourse to the administrative Courts is cheap and easy, and the powers which they possess of annulling administrative acts, *e.g.*, administrative regulations, enable them to exercise a very stringent control over the executive. The institution of a *Tribunal des Conflits* prevents them from arrogating the right to decide matters which do not properly fall within their competence. This Court is representative of the judicial and administrative authorities, and to it is given the right finally to decide whether a particular matter is within the jurisdiction of the ordinary Courts or belongs to the Administrative Courts.

The organization of the Administrative Courts and of the *Tribunal des Conflits*, and the rules of law which are administered in them, form an important part of the Administrative law in France and are indeed sometimes spoken of as the *Droit Administratif par excellence* (i).

Administrative Courts with jurisdiction similar to those of France do not exist in Egypt. The Native or Mixed Courts respectively have jurisdiction to decide all claims by private citizens against the state by which it is sought to make the state civilly responsible for administrative acts (D. R. (Native), art. 15 ; S. O. (Mixed), art. 11 ; M. C. C., art. 7). This is the principle also applied in England in which country no administrative Courts exist, and the Government official is amenable to the jurisdiction of the ordinary Courts in respect of acts done in his official capacity. The articles above

(i) For the French "*Droit Administratif*," see Dicey, *op. cit.*, Chap. XII. ; and for an exposition of the French principle and a detailed statement of the organization of the French administrative Courts, see Berthélemy, *op. cit.*, pp. 75 ff., 842 ff. There is a general appreciation of the character of French *Droit Administratif* by Dr. Walton in *Juridical Review* (1919), pp. 225 ff.

cited limit, however, the jurisdiction of the Courts, by providing that they cannot "interpret or suspend the execution of any general administrative measure." What is the precise meaning of this limitation is not easy to say, but the Native and Mixed jurisprudence indicate that while the Courts can entertain an action for damages against the Government for illegal action taken by officials in their public capacity or for failure to perform duties imposed by law, the claimant must be able to refer to some law which imposes the duty. The Courts are not competent to entertain claims based upon action by the Government in pursuance of its discretionary powers as the representative of the community (*k*). Moreover, the Courts have certainly no power to annul regulations issued by the executive authorities. But they are (*semble*) entitled to examine into their legality and may decline to apply them (*l*).

There exist in Egypt, however, certain inferior Courts staffed by officials and having jurisdiction to decide disputes with reference to matters of a special character, and to inflict fines for breaches of certain administrative regulations. Such are the Customs Commission and the Canal Commission. There is a widely spread tendency to institute administrative tribunals of this type, and of course, so far as their jurisdiction extends, it does trench upon that of the ordinary Courts (*m*).

#### CRIMINAL LAW.

The Criminal law is that part of the law of a country which relates to the definition and punishment of acts which

(*k*) See O. B., VIII., No. 68; XI., No. 37; B. L. J., XII., 78; XVI., 237. See fully as to the jurisdiction of the Mixed Courts in this matter, Pélissié du Rausas, "Le Régime des Capitulations en Egypt" (2nd ed.), Vol. II., pp. 463 ff.

(*l*) See Grandmoulin, "Droit pénal égypt.", Vol. II., §§ 1992 ff.; O. B., III., No. 25.

(*m*) See fully as to Egyptian courts of this kind, Lamba, "Droit public de l'Egypte," pp. 370 ff.

the state intervenes to suppress. Criminal law is essentially punitive, and for this reason it is sometimes spoken of as Penal law (*Droit Pénal*). It is necessary to note the difference in this respect between the character of the sanctions imposed by the Criminal law and those imposed by Civil law. A sanction has been already defined as a conditional evil which threatens men in case of disobedience to some rule of conduct. Now sanctions may be applied either for the purpose of enforcing a right or punishing a wrong. These two methods of action may well be illustrated by a simple example. Let us suppose that little Ahmed is disobedient to the command of his father Abdullah and refuses to go to school. Now Abdullah may adopt any one of three courses. He might conceivably offer Ahmed a reward if he went quietly to school, or he might take Ahmed by the hand and lead him to school, or he might threaten Ahmed with punishment if he did not go to school. The state seldom, if ever, endeavours to secure obedience by offers of reward, but it frequently makes the disobedient subject perform the very duty which he has declined to perform, and it also frequently threatens punishment in the event of disobedience. The sanctions of the Civil law are of the former and those of the Criminal law of the latter class : the civil sanction aims at the enforcement of the right by the compulsory fulfilment of the duty, while the criminal or penal sanction seeks to secure future obedience to the rule of law by punishment for breach already committed (n).

Attempts have frequently been made to define " Crime," but have met with little success (o). The term in its widest

(n) Although the primary object of the civil sanction is the enforcement of rights, and that of the criminal sanction the punishment of wrong, the ultimate purpose of each is to secure obedience to the law. The knowledge that appeal can be made to the force of the state to secure the enforcement of a right induces fulfilment of the duty by the person subjected to it, and the fear of punishment in like manner leads to respect of the rights of others.

(o) It should be remarked that the English word " crime " does not

signification includes all acts which are punishable under the law. What acts are so punishable depends upon the legislation of the state which reflects the ideas held by the community as to the acts which merit punishment, or for the suppression of which the threat of punishment is necessary. Criminal Law selects certain acts and penalizes them. What acts it will select will vary at different epochs and in different communities. It will select primarily those acts which appear at the time most to endanger the conditions of social life and which it seems necessary to penalize in order to secure their suppression (*p*). The quantum of punishment accorded will depend partly on the degree of danger arising from the act, and partly on the abhorrence felt by the community at its commission.

The function of the state in Criminal law has been variously defined. In modern criminal administration the state undoubtedly plays a part of supreme importance, and one which differs widely in scope from that which it takes as regards the Civil law. It undertakes the investigation of matters which seem to involve offences against the Criminal law; it provides for the detection of crime and the capture of suspected persons. Special tribunals are instituted before which persons accused of crime are brought, and the prosecution itself is generally in the hands of a state representative. The growth of the Criminal law has indeed coincided with precisely correspond to the French word *crime* when the latter is used in its strict technical sense. The French divide offences against the Criminal or Penal law (*infractions*) into *crimes*, *délits*, and *contraventions*, a classification based upon the difference of punishment alone (F. P. C., arts. 6, 7, 8, 9, 464). In England the word "crime" has no technical signification, though generally used only of the more serious offences. In the English translation of the Egyptian Penal Code the word is used strictly in its French signification (see N. P. C., arts. 9, 10). This question of terminology is, however, best postponed until the study of the Criminal law is undertaken. In the text the word is used in its broadest sense to mean any offence against the Criminal law.

(*p*) Ihering, "Der Zweck im Recht," Chap. VIII., § 12.

the increase of the power of the state, which has become more and more responsible for the maintenance of public order and the exaction of public justice. The ground also upon which the right to punish is now usually based is that of social defence ; it is because the community needs to be protected against the criminal that the need for punishment arises, and the state in inflicting punishment is acting as the representative of the community at large (*q*).

The part played by the state in criminal administration, and the public character of criminal justice, justifies the inclusion of Criminal law under the head of Public law (*r*).

Criminal law is entirely imperative. It commands abstention from particular acts and threatens punishment in default. Its contents include a definition of the various kinds of acts which it seeks to suppress, such as murder, arson, theft, and the like, and a statement of the penalties inflicted upon those who commit them. In addition to this catalogue of offences and punishments, the Criminal Code should contain rules dealing with the limits of the application of the law and with those circumstances of a general nature which modify or nullify criminality or aggravate or mitigate penalties.

#### THE LAW OF CRIMINAL PROCEDURE.

To the Criminal law is attached the law of Criminal Procedure. This includes the subjects before mentioned as

(*q*) Other motives for punishment were undoubtedly dominant in early times, the chief of these being private vengeance. Indeed, the principal function of the state in regard to offences was, formerly, the regulation of private vengeance. The demand for retribution is still an important factor in moulding the provisions of the Criminal law.

(*r*) Any classification of the Criminal law meets with difficulties, but modern tendencies undoubtedly more and more justify its inclusion in Public law. In England, where private prosecutions are common, the public character of the Penal law is perhaps less clear than in France and Egypt, where the state representative (*Ministère Public*) is the normal prosecutor. (See further Holland, Chap. XVI., pp. 373, 375, and *contra* Salmond, pp. 72-75.)



falling under the head of Procedure, so far as these relate to Criminal process. The Egyptian Criminal Procedure is modelled upon that of France, but very important alterations have been made since the issue of the Code of 1883, notably by the Law instituting Markaz Courts (Law 8 of 1904), the Law instituting Courts of Assize (Law 4 of 1905), the Law instituting Cantonal Courts (Law 11 of 1912). The law of evidence in criminal cases forms an important branch of Procedure in some countries, notably in England and other Common Law jurisdictions, where both in Civil and Criminal matters the rules as to the admissibility of certain kinds of evidence are very strict. But in Egypt there are no rules of criminal evidence (s). The judge can hear any evidence he pleases and must appreciate its weight to the best of his ability.

The history of Criminal procedure is of special interest as reflecting the fundamental beliefs and traditional usages of the peoples of different epochs. In communities in which belief in magic and like superstitions are prevalent protection against many acts which would among us be treated as criminal offences and be tried and punished in accordance with the evidence, is believed to be afforded by supernatural or non-natural agencies. Examples have already been given of the working of this belief in a previous chapter. The belief in Taboo is a belief in magic. The person who broke through the Taboo was punished not by human but by magical agencies. So again at a later stage of human development there existed a profound belief in the constant intervention of God, or the gods, in human affairs, and to this has been attributed the system of ordeals prevalent in mediæval Europe. The man suspected of crime was made to walk over red-hot ploughshares with naked feet, or to fight with his accuser, or do some other dangerous thing, in the belief that God would manifest his innocence, if he were innocent, by making him pass unharmed, or by giving the victory to the right (t). The present rationalistic methods of prosecution and proof are based upon beliefs of increasing strength in the natural order of the universe.

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(s) O. B., X., No. 84. N. P. C., art. 238, furnishes an admitted exception.

(t) See more fully Tarde, "La Philosophie pénale" (2nd ed.), pp. 433 ff.

So also methods of prosecution have changed, crime being now regarded as primarily an offence against social order, and the rôle of the State as prosecutor has become of increasing importance. The "private prosecutor," well known to the English Common law, plays but a minor part in Continental systems and in Egypt. Normally it is the state which prosecutes.

### CIVIL LAW.

The adjective "civil" is derived from the Latin *civilis*, which means relating to a city or state (*civitas*). In Latin the term *jus civile* was used strictly of the law of the citizens of Rome, in contrast to the *jus gentium*, or law of foreigners. The modern uses of the word "civil" and of the expression "Civil law" are very numerous. In the Middle Ages the term Civil law was used to mean the whole body of Roman Private law, and this was contrasted with the Canon law, or Law of the Church. The Roman law was by far the most important body of Private law in existence, and consequently the term Civil law was appropriated to it. It is in this sense that the term is still most correctly used in English. In England the Roman law never became Common, *i.e.*, National, law. The old contrast is, therefore, still maintained. Students of Roman law are in England still called civilians, the professors of Roman law are, at least at the old Universities, termed Professors of Civil law, as distinguished from Professors of Common or English law, and at Oxford a degree obtained in the faculty of law is still termed a degree in "Civil Law." This latter is a curious survival of the days when the Roman law alone was taught at the Universities, the teaching of English (Common) law being left to the professional organizations (Inns of Court). On the Continent of Europe, however, the Roman has been received as Common law, and the consequence is that the term Civil law (*Droit Civil*) is now used to mean the existing Private law of the country, and not the old Roman law, as

it existed at the time of Justinian. At the present day the word "civil," even as used in England except in the special case just mentioned, denotes that which is general as distinguished from that which is special, and that which relates to private life as distinguished from that which concerns public, or more particularly military, life. Thus in common speech the phrases "civil employment," "civil costume," "civil engineering," are used to designate that which belongs to the everyday business of life. In the sphere of law the term has many different uses, but one or both of the two ideas mentioned above will always be found to be connoted by it. "Civil" is contrasted with "criminal" to point the distinction between state intervention directed only to the adjustment of the rights of private individuals and the punishment by the state of acts which it seeks directly to suppress. Thus civil Courts are to be distinguished from criminal Courts, and civil liability from criminal liability. The *partie civile* in French and Egyptian criminal process is the private person seeking civil damages for the injury which the accused is alleged to have committed against him. Again, Civil law is used to designate the body of rules of Private law which relate to the generality of the members of the state as contrasted with those which govern the relation of special classes. Thus Commercial law, though forming part of Private law and included in the Civil as opposed to the Criminal law, is yet contrasted with the Civil law as relating to a special class of persons or of affairs, while the Civil law is the common law of all persons. It is in this sense that the word "civil" is used in the phrase "Civil Code."

The Private law may from this point of view be divided into Civil and Commercial law, the latter including or excluding Maritime law at pleasure. The separation of Commercial and Maritime law from the rest of the Civil law is convenient, but does not rest on any scientific basis. It is

convenient to group together the rules which have particular reference to matters of trade, but there is no other reason for making the distinction. Since Egypt has followed French precedent in collecting this special body of rules in a separate Commercial Code, it is desirable briefly to note the subjects which are there dealt with. These are (a) the contracts principally in use in Commerce, including contracts of association in carrying on business, such as partnerships and companies, bills of exchange, commission agency, commercial pledge, and contracts for carriage, etc.; (b) bankruptcy. The French Commercial Code includes also the subjects dealt with in the Maritime Code of Egypt. Such are the rules relating to the sale of ships, engagement of the crew, contracts of affreightment, maritime pledge, and marine insurance.

The Civil law, as the law governing the relations of the ordinary citizens, is sometimes also contrasted with other special bodies of law, such as the Military law, which concerns the organization of the army and the special rights and duties of soldiers, or the Ecclesiastical law, which has similar reference to the special position of the authorities of the Church.

In most cases it will be found that classifications of law in actual use have arisen not from any essential differences in the nature of the rules, but from historical accident, which has caused different classes of matters to fall within the jurisdiction of different Courts. Sometimes the distinction has continued long after the difference in jurisdiction has ceased to exist. Thus in England the Private law is divided into Common law, Equity, Admiralty law, Probate and Divorce law. This division arose merely because this was the historical division of the Courts, and even though the jurisdiction of the Courts has been changed, the classification continues to be used. The division of Commercial from Civil law owes importance to the fact that there exist in

France special Commercial Tribunals (*u*). And the same may be said of Administrative law. In Egypt there is a natural tendency to contrast the Civil law with the Law of Family and Succession, just because these two matters are within the jurisdiction of different tribunals to those which administer the rest of the Civil law. The term Civil law ought, however, to be used to include both these matters as well as those dealt with in the Civil Code. The peculiar conditions of Egypt have limited the scope of the Civil Code, which does not, therefore, contain the whole of the Egyptian Civil law.

The Civil or Private law is also susceptible of divisions based upon the nature of the interests which require protection and regulation by law. In primitive societies the family was the centre of almost all a man's rights and duties. His personal relations to others were determined by his condition as a member of the family or clan, and this also governed his proprietary position. Thus Family law was all-inclusive. At a later stage, as individual ownership grew in importance, a distinction had to be drawn between Family law and the Law of Property. The Law of Succession formed a branch of Family law, for the rights of the members of the family to the succession were dominant. Its position has been gradually changed as the power of the individual

(*u*) In England also there existed in the Middle Ages special tribunals for administering the "Law Merchant," *e.g.*, Courts of Pie Powders; but eventually the Law Merchant was absorbed into the Common Law (Holdsworth, "Hist. Eng. Law," II., p. 259; Jenks, "Short History," p. 40). In France, as in Italy, merchants in the Middle Ages enjoyed special privileges as to jurisdiction. Mercantile suits were brought before arbitrators chosen at first by the parties, and called Consuls, and this peculiar organization transferred later to the East was the origin of the system of Capitulations so familiar in Egypt. The elective and lay character of the judges of the Mercantile Courts has continued in France up to our own day (French Code de Commerce, arts. 618 ff.; Loi 8 déc. 1883).

It is interesting to remark that while in France the Commercial Law is mainly administered by laymen, in England it is the Criminal Law which is largely so administered.

over his property has grown at the expense of the interests of the family. Thus the Law of Succession was detached from the Family law and became a supplementary chapter in the Law of Property. In Mohammedan law, as in Hindu law, both of which retain the ideas of an earlier epoch, and closely restrict in the interests of the family the individual's control over his estate after death, the older connection of Family law with the Law of Succession continues to exist. As the individual became more and more independent of the family the sphere of his proprietary liberty naturally widened. To an increasing degree he determined his relations with others under a system of free contract. At the present day this is the instrument by which a man's position in the community is normally fixed. By contract a man binds or obliges himself to do or not to do some act. Such an obligation towards others may also be imposed upon him by the state independent of contract. And these state-imposed obligations are tending to increase in number in the reaction which is to-day manifesting itself against a freedom of contract alleged to be excessive. To the Law of Family, of Property, and of Succession must therefore be added the Law of Obligation, which includes the rules regulating and protecting the rights and duties arising from contract, or imposed by the law independent of contract.

This fourfold division of the Private law may be traced in a more or less modified form in most of the current classifications. The Roman jurists distinguished between the Law of Persons, which contained the Family law, and the Law of Things, which contained the Law of Ownership, of Succession, and of Obligations. The classification in modern Civil Codes follows the same principles. The French Code is divided into three books, of which the first treats of the Law of Persons, the second of the Law of Property, and the third of the law regulating the acquisition of property, which includes the topics of Succession and Obligations.

The German Civil Code is divided into five books. The first contains preliminary matter; the second is devoted to Obligations, the third to Property, the fourth to the Family, and the fifth to Succession. The Egyptian Codes do not treat of the Family or of Succession, but otherwise they follow European precedent. The Native Civil Code, for example, contains three books, dealing with Property, Obligations, and Special Contracts respectively.

#### THE LAW OF CIVIL PROCEDURE.

The "adjective" Civil law treats of the organization of the Civil Courts, Civil Process, and the methods of Civil Execution. The law of evidence in Civil cases may also be included under this head. Certain rules of evidence, however, which apply to particular classes of rights only and which require special methods of proof for their enforcement, are more conveniently dealt with in close connection with the study of these rights. Thus the rule that an obligation can only be proved by written evidence where the sums involved are over P. T. 1000 (N. C. C., art. 215), and that a right of hypothec can only be enforced if it has been inscribed at the Court Registry, are rules requiring special modes of proof.

The law of Civil Procedure, like that of Criminal Procedure, is of special interest to the legal historian. The development of both the Roman and the Common law has been effected, in the earlier stages at least, by changes of procedure. The question which Courts of Justice have often asked themselves is not so much whether the complainant has a right, as whether he has a remedy. Thus, to take an English example, if one person sued another for damage to his goods, the question in issue before the Court was not whether the defendant had broken an admitted rule of law, but whether the plaintiff could obtain redress by the special form of action which he had chosen to adopt. A decision extending the scope of the form of action meant in reality the recognition of a new right, although in appearance it was only a decision upon a question of procedure. Examples of the same process could be quoted from the history of the Roman formulary system. The use of procedural fictions both in Roman and English law much assisted the development of the law in this way.

One may ask why this curious method for developing the law should have been so common in early times. The answer is to be found in the absence of an active legislative authority, coupled with the conservatism of the Courts. Judges do not like ever to say that they are making new law, they prefer to assume that they are only interpreting old law.

To keep within the letter of the law by which they are bound while making free use of their powers of interpretation is consistent with the conservatism of the Courts and also with their desire to administer justice according to the needs of the people. Changes and extensions of procedure do not in appearance affect the body of the law, but while they preserve the form they often alter the substance. For this reason their use has been much favoured in effecting what are really often very substantial reforms. The Mixed Courts by a broad interpretation of the rules governing their own competence have enormously influenced the rights of foreigners and natives in Egypt. And the practical difficulties in the way of procuring mixed legislation has no doubt contributed to induce such an interpretation.

#### INTERNATIONAL LAW.

The term International law (*Droit International*) is used on the Continent to include the whole body of law intended to regulate the relations of states between themselves. This law is distinguished as being Private or Public. Private International law should include the rules of international obligation (*i.e.*, binding between states) which concern the private affairs of subjects of the states. Public International law includes the rules which concern the action of the states as representing communal interests. Thus an international rule to determine how the succession to the goods of a foreigner is to be regulated is a rule of Private International law, but a rule which regulates the seizure by a belligerent state of ships belonging to a neutral state (or its members) is one of Public International law.

In this sense it is doubtful whether there are any rules of Private International law at all, and in England the unqualified term International law is used of Public International law only.



## PRIVATE INTERNATIONAL LAW.

The Egyptian student is accustomed in his own country to see matters in which there is a foreign interest, and questions which concern the Law of Family and of Succession removed from the jurisdiction of the Native (secular) Courts. It is necessary that he should bear in mind the peculiar situation of Egypt in this respect, if he wishes properly to understand the principles of the application of law in Europe. It has already been pointed out that law in European countries is normally applied on a territorial basis, and that the territorial tribunals alone have jurisdiction within the boundaries of the state, whatever the nationality or religion of the parties may be. The Law and the Courts are uniform for all. It must not, however, be inferred that the Courts of a country are never prepared to refer to rules of foreign law in deciding questions in which some foreign interest is present; and, moreover, their own claim to territorial jurisdiction equitably involves a recognition of the validity of the similar jurisdiction of the Courts of other countries within their respective boundaries.

The existence of an extensive peaceful and commercial intercourse between the subjects of different states has made it necessary for each country to define within what limits such recognition of foreign law and foreign jurisdiction will be accorded. The rules which state these limits form a body of law known in France as *Droit International Privé*. This term, which, translated into English, gives the name Private International Law, has been subjected to criticism by English writers on the ground that these rules of law are in no sense of international obligation. They are not binding between states, for each state regulates, as it thinks fit, its acceptance or rejection of foreign law or of the validity of the jurisdiction claimed by foreign Courts. And the fact that Courts are in no way bound to apply any rules except those of the law

of their own state has been emphasized by some English writers by the use of the term "Comity of Nations" to describe the application of foreign law in cases in which a foreign interest occurs. Comity is a sort of politeness or courtesy and (it is said) that international courtesy may demand the application of a foreign law though no international right can be claimed. The name preferred, however, in England is that of "Conflict of Laws," its appropriateness being due to the fact that there exists, as it were, a conflict between the different systems of law for application to the given case, the regulation of this conflict being the scope of this department of law (x).

On the Continent of Europe, however, the practice of most countries in this matter is generally similar, and this gives a certain international character to the rules applied. Moreover, some Continental jurists give a strong international tinge to their writings upon this subject by insisting rather upon the ideal body of rules which in their opinion ought to be applied in all countries than upon the rules actually in use.

Indeed many Continental international lawyers insist very strongly that the rules of so-called Private International law are indeed of international obligation. But their views appear to be based on a radically false conception of the nature of law. Thus, the late M. Despagne said: "*Sans doute, le Droit, dans ses différentes branches possibles, se révèle par un pouvoir législatif qui l'édicte, des magistrats qui l'interprètent et l'appliquent, une puissance exécutive qui en assure la sanction. Mais, auparavant, il existe comme ensemble de préceptes de raison et de justice que les autorités organisées ont précisément pour mission d'exprimer et de faire observer, mission dont elles s'acquittent plus ou moins bien, suivant leurs lumières et le développement de leur moralité*" (y). It being then assumed that law exists before its acceptance, formulation, or application, it is easy to conclude that there is a body of principles of justice or what not governing the international relations of private

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(x) Holland, Chap. XVIII., pp. 411, 415; Westlake, "Private International Law," pp. 4, 5. The term "International Private Law" which is sometimes used seems to have much to recommend it.

(y) "Droit international privé" (5th ed.), § 14.

persons which is in part manifested by the decisions of the Courts of the various countries. And according to the notions of these writers, it is the work of international jurists to expound these principles and secure their adoption by the Courts. But this theory of a "natural" law of international obligation is wholly unsound. The Courts and the jurists may well co-operate in securing uniformity between the rules employed in various countries to regulate the relations of persons when a foreign interest occurs. This is very desirable. But when (for example) a French Court applies the law of the deceased's nationality to determine the persons entitled to share in the succession, it is not applying a rule binding upon the French Government, and therefore upon its Courts, by an international law, and uniformity among the decisions upon such a subject by the Courts of France, Italy, Germany, and the like is not the result of the existence of a rule which in any legal sense obligatory in common upon them all.

A true Positive Private International law might indeed exist, and steps have been taken towards its creation by agreements between certain Continental states following upon Conferences at The Hague. By these agreements the contracting parties bind themselves each to enforce as law within their respective jurisdictions certain common rules upon matters of private international law. Here we have a nucleus of a future Private International law truly of international obligation (z).

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Private International law is of comparatively modern growth, and a word or two as to its history is desirable since it introduces us to two terms much used in Egypt, viz., the Personal and the Real Statute.

Towards the close of the Middle Ages there existed in Italy a number of practically independent city states which were in constant intercourse with one another. All of these city states acknowledged the supremacy of the Roman Law, which was often referred to as constituting the "*Lex*." But each state had also special rules of its own which formed its statutes (*statuta*), and it frequently became necessary to determine how far the legal affairs of the citizen of one city resident (say) in another were governed by the "statutes" of his own city or by those of the city of his residence.

(z) As to the Conferences at The Hague, see Despagnet, *op. cit.*, § 17, and Baty, "Polarized Law."

Discussion of questions of this description was a discussion about "statutes," and thus it came about that the theories which were put forward upon the subject were termed theories of statutes. Now from these discussions there emerged a distinction drawn between the Personal and the Real Statutes. The Personal Statutes were those which followed a man wherever he went. If, therefore, the question at issue required for its solution a rule of the Personal Statute it was the law of the person's own city which was applied. The Real Statutes, however, did not follow a man, so that they were applied without regard to the citizenship of the party. The doctrine of Statutes was also applied in France to determine questions of application of law when there arose a conflict between the laws and customs of one town or district and those of another. For, as we have mentioned above, the mediæval law of France was not homogeneous, and in the *pays de coutume* particularly each place had its own special rules. The term Theory of Statutes was still applied, however, to the doctrines on the question. As peaceful intercourse between the western nations grew in volume similar questions began to arise in the Courts of the different countries, and the Theory of Statutes came to have an international importance. New views were put forward as to the basis upon which foreign law should be applied, and the term Statutes gradually became obsolete. It has been now superseded on the Continent by the term Private International Law.

☛ To return, however, to the so-called Personal and Real Statutes, it is to be remarked that a considerable difference of opinion arose as to what rules fell within each of them respectively. But there came to be general agreement that questions as to the status and capacity of the person were to be determined by his personal statute, as also were those relating to the succession to movables. The old adage runs "*Mobilia sequuntur personam*," i.e., movables follow the person, or "*Mobilia ossibus personæ inhaerent*," i.e., (literally)

movables are fixed in a person's bones. The idea was that movable property had not, like immovable property, an unalterable situation, and that we might regard it as present wherever its owner was. This was a fiction designed to make it appear that the rule according to which the immovables were governed by the law of the place where they were situated applied also to movables.

The theory of Real and Personal Statutes is certainly obnoxious to criticism, but the terms are now consecrated and their meaning fixed. In Egypt the Personal Statute of natives is religious and is administered by religious Courts, while the "Real Statute" is secular and administered by the ordinary courts. Foreigners have their own Personal Statute which is administered by the Consular Courts, while in their relations with natives, or as between foreigners of different nationality, their Real Statute is that of the Mixed Codes and is administered by the Mixed Courts (a).

The rules of modern Private International law are concerned with the determination of two questions, the choice of the law to be applied (*lex*) and the choice of the Court within whose jurisdiction the matter lies (*forum*). These two questions inevitably arise in the administration of justice whenever there exists a multiplicity of Courts within a country which administer different bodies of law. The peculiarity of Private International law is, however, that under its rules it is a reference to foreign law and the jurisdiction of foreign Courts which are in question (b).

(a) See further as to Real and Personal Statute in Egypt, below, pp. 260 ff.

(b) No question of the choice of law (*lex*) could arise before a religious Court, since such a Court can apply only the special religious law administered by it. For example, if a Mehkemeh is called upon to regulate the succession of a Christian, as not infrequently happens in Egypt, it would decide any question of the status of the persons concerned (e.g., the legitimacy of the children) in accordance with the principles of Mohammedan law alone. Thus the doctrine of *legitimo per subsequens matrimonium* would not be recognized, since in

A few examples will make the nature of these questions clearer.

*Choice of Law.*—If A. and B., two English people, have been married in France according to French forms, the validity of their marriage *in England* may depend upon whether the English Courts apply to them the law of the country in which the marriage took place (*lex actus*) or the law of the nationality (*lex ligentice*) or possibly the law of the country in which they were permanently resident (*lex domicilii*). Similar questions might arise if A., an Englishman, makes in France a will in French form. In such a case the question would normally be brought before an English Court only if A. left property in England, and the English Courts would then have another basis for their choice of law, namely, the law of the place where the property was situated (*lex rei sitæ*) (c).

*Jurisdiction.*—If a French Court grants a divorce to A., declares A. bankrupt, or gives judgment against him on a claim by B. for damages for breach of contract, the question of the jurisdiction of the French Courts to do any of these things might be raised before the English Courts in the event, for example, of A. marrying again in England, or possessing property in England upon which his creditors wished to levy execution. The English Courts would decide the question by reference to the rules of Private Inter-

Mohammedan law a child not born during the marriage cannot be made legitimate by the subsequent marriage of the parents (cf. Statut Personnel, art. 333). In practice, however, the Mahakem el Sharia do not go out of their way to question the status of the parties when no dispute is raised. They accept the status acquired under the personal religious law, and do not demand proof that such status was properly acquired according to the rules of the Sharia.

(c) Different systems of law may be applied to each of a series of transactions. Thus, if A. draws a bill of exchange in Egypt payable in England and the bill is negotiated in France, the obligations of the three parties must be determined in each case by some but not necessarily by the same system.

national law governing the question of "*forum*." Thus, they might decide that the proper Court to grant a divorce or declare a man bankrupt was the *forum domicilii*, or that the proper Court to decide as to liability on a contract was the Court of the place where the contract was made (*forum contractus*). If, on one of these grounds, the jurisdiction of the French Court was admitted its judgment could be made enforceable in England (*d*). In such cases the Courts of one country do not presume to interfere at all with the jurisdiction of the Courts of another. The question is not whether the French Court, for example, had jurisdiction in France, but whether the judgment binding in France will be considered binding in England also.

Questions of Private International law may arise before the Egyptian Courts, but the existence of the Mixed and Consular jurisdictions and the religious nature of the Egyptian Law of Succession cause them to be of less frequent occurrence (*e*).

(*d*) The methods by which a foreign judgment is made enforceable in a country vary. Thus, if A. recovers judgment against B. in a French Court and wishes to execute the judgment against property of B. situate in England, he must bring an action against B. in the English Courts to have the judgment enforced (Dicey, "Conflict of Laws," Rules 91, 102). This does not, however, apply to Scotch or Irish judgments directly enforceable under the Judgments Extension Act, 1868. On the other hand, "in most Continental countries foreign judgments are not treated as new causes of action, but are admitted to execution, or declared executory, as it is called, after a special proceeding for that purpose" (Westlake, "Private International Law," § 313). Thus the Mixed Codes contain a provision (M. C. C. Pro., art. 468) to the effect that foreign judgments shall be executory in Egypt by order of the President of the Court, provided that the country from the Courts of which the judgment emanated would in like case execute judgments of Egyptian Courts. For the interpretation of this article see B. L. J., XIII., 280, 342; Gaz. Trib., V., No. 100.

(*e*) A special body of law, to wit, the Mixed Codes, has been agreed upon by the Powers having Capitulations as that to be applied to their subjects in their relations with each other and with Egyptians. By art. 34 of the S. O. (Mixed) this law is to be applied by the Mixed

## PUBLIC INTERNATIONAL LAW.

Public International law (in English, International law) includes the rules of law or custom regulating the relations of states among themselves when acting in pursuance of communal interests. Like the so-called Private International law it is of modern creation and its rise upon the basis of Natural law has been already remarked (*f*). Modern International law has for the most part abandoned the appeal to the now discredited Law of Nature, and rests partly upon international custom and partly upon agreements made between the states to supplement or supersede the custom. Custom plays here a similar part in the creation of rules of law to that which it played in the earlier history of the systems of Private law. In the absence of a common legislative authority and of Courts, common practice forms an excellent basis for legal argument. Suppose, for example, that a dispute arises between two countries which for the sake of illustration we will term Utopia and Achoria. The question relates to the action of a Utopian cruiser in seizing on board a ship flying the flag of Achoria certain persons who are subjects of a third state, Anemolia, with which Achoria is at war. Whether Utopia or Achoria is in the right cannot be determined by appealing to a formulated international law, or by an action brought before a tribunal to which each is amenable. What more natural appeal in such a case than that to general practice? If the action of Utopia is strictly in accordance with the general practice of the past in such matters, the complaints of Achoria may be regarded as merely factious. To keep within the path of custom is, therefore, the part of a "good" state, as it used to be that of a "good" savage; and is still that of many a civilized Courts. It follows that in practice, while disputes as to the choice of jurisdiction often occur, questions as to the choice of law are seldom raised.

(*f*) See above, p. 143.



man in matters to which positive law does not apply, and often, also, where it does. During the last sixty years, however, it has been found possible to supplement and amend existing custom by treaties formulating general rules to govern matters of international concern. Treaties (Conventions) of this character form now a very important factor in the creation of International law. They determine the conduct of the contracting parties in the event of disputes arising between them and regulate, in particular, the conduct of war. As examples may be mentioned the Geneva Conventions of 1864 and 1906 and the Hague Conventions of 1899 and 1907 (*g*).

A further step was taken towards the formation of International Public law by the creation of a permanent Court of Arbitration at The Hague for the settlement of disputes between nations (*h*). Obviously the use of this Court must be optional since there exists no sovereign power capable of forcing states to submit to arbitration rather than to go to war. But so also in the early history of the Civil law we find that the state was at first rather an arbitrator than a judge. And in the history of Civil Procedure one of the most interesting points to note is the gradual adoption by the Courts of the state of means by which persons could be forced to submit disputes to their jurisdiction. So also in the relations between nations customs and self-redress may be superseded in the distant future by Positive law and Courts with compulsory powers of asserting their jurisdiction.

(*g*) The Geneva Conventions, of which the one of 1906 has for the most part superseded that of 1864, have reference to the treatment of the wounded. The Hague Conventions, which are the outcome of the two Peace Conferences held at The Hague, regulate a great variety of matters relating to the conduct of war and the rights and duties of neutrals, and contain, moreover, provisions as to the settlement of international disputes by arbitration.

(*h*) A further step has recently been taken by the establishment of an International Court of Justice under the League of Nations.

The rules of International law are usually discussed under the three heads of Peace, War, and Neutrality. Under the first of these heads are placed the rules to be followed in the peaceful relations of states. These regulate such subjects as the recognition and international protection of citizens of the various states, the conditions of the acquisition of state territory, the negotiation and nature of treaties, the rights and duties of ambassadors and other diplomatic representatives, and the processes adopted for the amicable settlement of disputes. This last subject includes the consideration of the process of arbitration with special reference to the arrangements made by the Hague Conventions for the establishment of a permanent Court of Arbitration. To the head of War belong the rules relating to the declaration of hostilities and the effect of a state of war (or belligerency) upon the mutual relations of the belligerent parties. The laws of war determine the methods which may legitimately be used in carrying on hostilities (certain exceptionally barbarous methods having been expressly forbidden by treaty), the attribution of enemy character, the duties of the belligerents towards prisoners and wounded persons, and their right of seizure or use of enemy property.

A state which is at peace with both belligerent states is said to be neutral. Under the head of Neutrality fall the rules governing the rights and duties of neutral states and of the belligerents in their relations with them. The two most important subjects discussed under this head are those of Contraband and Blockade. The subjects of a neutral state are forbidden to render assistance to a belligerent by sending to it certain classes of goods known as contraband, and attempts to do so render the goods or the ship in which they are carried liable to seizure. Moreover, the blockade of a port of one belligerent by another gives to the blockading force the right to seize neutral ships and goods which seek to enter.

Strict adherents to the Austinian view as to the nature of law maintain that the absence of any superior authority, to whom belongs the power to enforce its obedience by the imposition of legal sanction for its breach, robs International law of the true character of Positive law, or at least differentiates it from the "Municipal" law (i) enforced within a state. Yet the name of law cannot be properly denied to it. Although its only sanction is the international disrepute into which a state failing to observe its provisions would fall, or the ultimate exaction of punishment by way of war on the part of the offended state, yet otherwise its rules bear all the marks of true law. They are applied to the regulation of relations similar to those governed by municipal law, they are interpreted on the same principles and by reference to the same judicial conceptions, and are in fact observed as law by the states which form the family of nations.

*International Law and the League of Nations.*

International law is, of course, only applicable between states which are independent one of another. Between states which are united for the purpose of international action, *e.g.*, between the component parts of the British Empire, there can be no International law. The rules determining the modes of joint action or regulating otherwise the relations of the parts among themselves fall within the scope of Constitutional law. So, also, when one state is in any way dependent upon another, *e.g.*, subject to a protectorate, the relation of the protecting state to the dependent state are rather constitutional than international. A new conception has, however, been introduced by the establishment of a League of Nations.

During the nineteenth century the Great Powers of Europe (France, Great Britain, Austria-Hungary, Germany, and Italy) had been in the habit of acting together in dealing particularly with the difficult problems raised by the weakness of Turkey. In thus acting they were often spoken of as representing the "Concert of Europe."

More recently conferences upon international questions have frequently been held, attended by representatives of a large number of

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(i) The term Municipal law is sometimes given to the internal law of a state in contrasting it with International law (Holland, p. 387).

states and a certain continuity was given to this form of international co-operation by the holding of successive international conferences at The Hague, the first of these having met in 1899 at the instance of the Czar of Russia.

After the war it was desired to give this international co-operation a more definite and lasting form, and the outcome of this desire was the Covenant of the League of Nations. The League is established by international treaty, and membership of the League binds the state to the observance of certain rules which limit its legal right to act freely in certain cases. This is, of course, the normal effect of a treaty. By agreeing with another, or other states, to act only in a certain way, a state renounces the right, which it would otherwise have, to act in any other way allowed by International law. The League does not establish a new state; that is to say, it is not itself a state. Nevertheless it will, if successful, create a new unity among the nations, larger and more far-reaching than the old Concert of Europe. The objects of the League as laid down in the Covenant are to promote international co-operation and to achieve international peace and security. To accomplish these highly desirable aims the signatories of the Covenant establish the League and create an organization consisting of an Assembly and a Council with a permanent secretariat. Provision is made for the formulation of plans for the reduction of armaments to be approved by the several governments, for the submission to arbitration, or enquiry of disputes between the signatories and for the establishment of a Permanent Court of International Justice (arts. 12-15). The members of the League undertake to respect and preserve as against external aggression the territorial integrity and existing political independence of all the other members (art. 10), and it is further agreed that should any member of the League resort to war in disregard of its agreement to submit a dispute to arbitration or enquiry, the other members will sever all trade or financial relations with the offending state and take other measures with a view to protect the covenants of the League (art. 16).

The League holds no territory; it has not "temporal power." But it occupies a special position with reference to the greater part of the territory detached from Germany and from Turkey as a result of the war. Such territories are to be governed by selected Powers as "mandatories" of the League.

The term "mandate" in this connection suggests more than it means. The principal Allied Powers themselves are to select the mandatories, and the terms of the mandates are to be formulated by them, and only submitted to the Council of the League for approval. It does not appear that the League is given any right to criticize the

selection or to revoke a mandate. The relation of the League to the mandatory state is, therefore, substantially different from that which exists in Civil law between a mandator and a mandatory. Indeed, the mandate of the League may perhaps be best described as a public acknowledgment on the part of the mandatory power of an international obligation to administer the territory concerned in accordance with the rules laid down in the mandate, and a promise to submit the methods of administration to the periodic criticism of the League. (See art. 22 of the Covenant.)

The obligations undertaken by members of the League are, therefore, of an international character, that is to say, they are binding under International law. In this respect they differ in nature from the bonds uniting the component parts of a single state. It is conceivable, of course, that the League may eventually become a true Federation of Nations, and the relations between the members would then cease to be international, and become constitutional. Such a consummation may be desirable, but it could only happen if the League obtained coercive powers independent of those of its members. At present it has none, and the only forcible action possible for it is the joint action of the members faithful to the Covenant.

Any development of this kind is far distant. If it occurred we should be approaching a World Federation, an approximation in idea to which is now presented by the union of the self-governing parts of the British Empire. There we find a group of states, each of which is an autonomous unity, subjecting itself voluntarily to a common authority for purposes of defence and international action. In law the common authority is the King in Parliament, practically it is the King acting on the advice of his British ministers, assisted by the representations of the other component parts of the Empire. The whole armed force of the British Empire is the King's Army, the King's Navy. The British, the Australian, the Canadian forces are not the forces of separate states acting in common by agreement, but indivisible parts of one whole.

To accomplish a World Federation of this kind it will be necessary, to create a sentiment of unity among people of all nations similar to that which actually exists, mainly by reason of common tradition, race, and language, between the component parts of the British Empire. Such a sentiment may exist in spite of differences of race and language, but its development is sure to be slow. Whether the future is to bring disintegration or further integration we can only surmise.

## CHAPTER VII.

### THE APPLICATION OF LAW.

#### § 1. IMPERATIVE AND FACULTATIVE RULES.

ALTHOUGH Law is essentially obligatory in character, this does not imply that all its rules are in the form of direct commands to persons to do or to abstain from doing certain acts. The aim of the law is the protection of the liberty of the individual and the promotion of the well-being of the society, and to reconcile these two ends it is necessary to mark out the limits of individual liberty and of social action. Consequently, some rules of law directly command acts the accomplishment of which is necessary<sup>e</sup> for the society or forbid acts which are inimical to society or to the requisite freedom of individuals ; others trace the limits of the sphere within which the individual may act freely and by implication forbid action on the part of others which interferes with such freedom ; and yet a third and very large class provides for cases in which the individual though free to regulate as he chooses his relations with others has not in fact done so.

— To the first class belong rules creating social duties, such as military service, payment of taxes, and the like, rules of Criminal law which under pain of punishment forbid certain kinds of action, and many rules of Civil law which are compulsory in the fullest sense, seeing that the Courts are bound to enforce them despite the contrary will of the persons interested. To the second class belong rules which create and define liberties, such as the liberty to make a will, to enter into contracts, and the like. And in the third

class must be placed rules applied by the Courts only in the absence of any contrary provision by the persons whose interests they regulate. Thus the law which confers upon the subject a liberty to dispose by will of the whole or part of his property also provides rules according to which the inheritance will be regulated so far as the deceased has not availed himself of the liberty given to him. And the law which permits men to enter into contracts with one another must provide rules to govern the consequences of the contractual relation so far as the parties have not themselves made such provision. So far as the parties have regulated their own relations by agreement between themselves, the Courts will abide by the arrangements thus made, within the legal limits of the parties' liberty of action. To that extent, therefore, the parties create a law unto themselves, and some writers term the rules so made "Conventional Law" (a) to distinguish them from the rules made by the state itself.

Laws of the first class above mentioned, those namely from which the individual is not permitted to derogate, are termed by the French "*lois d'ordre public*." No exact equivalent of this term exists in English. They may perhaps be termed "imperative laws" as distinguished from rules which are facultative only. But the idea is usually expressed in English legal language by referring to such rules as matters of "public policy." Where public policy demands that a rule should be observed it is not permissible for private parties to make dispositions in derogation of it.

It is not always easy to say exactly what rules are matters of public policy. The difficulty arises particularly in connection with the Civil law. It will, however, suffice here to indicate certain of the most important rules universally regarded as belonging to this class.

The French Civil Code contains a provision (art. 6) that

(a) Salmond, p. 31.

*“on ne peut déroger par des conventions particulières aux lois qui intéressent l'ordre public et les bonnes mœurs.”* Though a distinction seems here to be drawn between sound morals and public policy, yet this is done in order to emphasize the importance of moral rules and not because the observance of ordinary morality does not form part of public policy. On the contrary it belongs primarily to public policy to prevent the law being used to facilitate breaches of morality. Thus an agreement between two persons to assist one another in some immoral act, even if that act be not itself a breach of the law, would not be enforceable in the Courts, and consequently, if broken, no right to demand damages for the breach would be given.

The refusal to enforce gambling contracts is often put upon the same ground. Gambling is not indeed forbidden by the law in most countries, and bets and lotteries do not therefore infringe the law. In this case, therefore, the law merely declines to aid the parties. Such transactions are rather outside the law than contrary to it. Their general effect being to discourage thrift and encourage unsound methods of making money, the assistance of the Courts is refused to them on the ground of good morals (*b*).

But if the maintenance of sound morality is thus a matter of public policy, there are also many other matters in which the interest of the public is at stake, even though they do not strictly fall within the sphere of the Moral law. Public policy demands that people should be free to marry, that freedom of trade should be preserved, that property, particularly property in land, should not be rendered inalienable

(*b*) F. C. C., art. 1956. *“La loi n'accorde aucune action pour une dette du jeu ou pour le paiement d'un pari.”* See also Planiol, II., §§ 2107 ff. For the English Law see (*inter alia*) 8 & 9 Vict. c. 109 (1845) and Pollock, “Principles of Contract,” pp. 312 ff. For recent Egyptian applications of the doctrine of public policy, see O. B., XIII., No. 120; XIV., No. 95.



to an undue degree, that those who are unfit by reason of their youth to control their affairs should not be permitted to do so, and that formalities established to secure publicity for agreements should be observed. It is not competent, therefore, for individuals to create conventional law for themselves which would prevent these objects being secured.

The idea of public policy is not, of course, identical in all countries. Thus in France a testator is bound to leave a share of his property to certain members of his family, and under Mohammedan law only one-third of the total property can be disposed of by will. These provisions are made in the interests of the relatives, it being considered contrary to public policy or morality to leave them to the caprice of the testator. But in England no such limitations on testamentary power exist.

The limits of public policy have also undergone many changes at different epochs. In the Middle Ages, for example, the conduct of trade and business was controlled by rules as to apprenticeship, price, markets, and so on, which were made partly in the interests of the public and partly perhaps for the benefit of the close trade guilds which then existed. Such restrictions were found to hamper the development of commerce and to defeat their own ends. The regulation of internal trade corresponded to an analogous regulation of external trade in supposed national interests. This took the form of protective export and import tariffs intended to promote the wealth of the country.

The revolt against this system of over-regulation culminating in the victories of the *Laissez-faire* school in the nineteenth century is a matter of economic history.

At the present day a movement is in progress which, while it does not aim at the re-establishment of mediæval trade conditions, is yet based on the belief that trade cannot be satisfactorily conducted under conditions of absolute freedom. This movement has manifested itself on the one

hand in the manipulation of "scientific" tariffs which aim at the promotion of particular forms of industry within a country by their protection from foreign competition. In internal trade its influence is shown in the enactment of imperative laws fixing the relations of employers and workmen upon lines approved by the Government and overriding the rights of free contract between the parties. The justification for these laws is found in the necessity of protecting the workmen against improper terms forced upon them by the more powerful capitalist employers and also in the national need for conditions of labour fitted for the development of a sound civic life.

As examples of such laws may be mentioned, laws forbidding payment of wages in kind, laws providing for the conduct and inspection of factories and workshops, laws regulating the employment of women and children, and laws providing for the compulsory insurance of workmen against accidents occurring in the course of their employment (*c*). Nor is it only in the sphere of labour that the state has thus intervened to regulate business relations. Similar compulsory rules are found determining the relations of landlord and tenant (*d*). And in a wider sphere we find the law compelling parents to provide for the education of their children,

(*c*) The legislation on these and allied topics forms a body of law of very considerable bulk. Special attention may perhaps be drawn to the laws providing for the payment of compensation for accident. The English Acts upon this subject were passed in 1897, 1900, and 1906 (60 & 61 Vict. c. 37; 63 & 64 Vict. c. 22; 6 Edw. 7, c. 58). The last-named Act repeals and re-enacts the previous Acts in a consolidated form.

In France similar provisions were made by the Loi, 9 avril, 1898.

Industrial legislation of this kind is represented in Egypt by the law of 4th July, 1909, approving regulations relating to the employment of children in cotton-ginning factories.

(*d*) Cf. the English Agricultural Holdings Acts (1883-1906), by which provision is made for compulsory compensation to the tenant for improvements made by him during the term of his tenancy.

forcing citizens to train for military service, and obliging landowners to adopt particular methods in the development of their land, all of which are done on the plea of public policy. The further study of this subject belongs, however, rather to the sphere of Economic and Political Science than to that of Law.

## § 2. TEMPORAL LIMITS TO THE APPLICATION OF LAW.

When a Court is called upon to apply rules of law to a set of facts, it ought, on principles of equity, to apply those rules which were in force at the time when the facts arose. This principle is expressed in legal language by saying that laws have no retroactive effect—that is to say, they do not operate backwards so as to govern facts which arose before they came into force. Thus the French Civil Code states (art. 2): “*La loi ne dispose que pour l'avenir ; elle n'a point d'effet rétroactif*”; and this provision is copied by art. 3 of the Decree for the Reorganization of the Native Courts in Egypt.

The application of this principle involves also the conclusion that laws cannot be applied to govern facts which have arisen after they have been repealed. Thus the limits in time of the application of laws seem to be clearly defined. They only govern facts which arise between the date at which they come into force and the date of their repeal.

But the principle thus easy to formulate is by no means so easy to apply. Only a few of the problems to which it gives rise can, however, be indicated here.

In the first place, we may ask what precisely is meant by a retroactive law. The older view was that a law was retroactive if it affected acquired rights (*droits acquis*), and that it was not retroactive if it destroyed mere expectations. Thus if a new law declared null marriages in a particular form even though they had been entered into before the date

of the law and at that date were valid, the law must be regarded as retroactive, since by entering into a marriage in a form then valid the parties had acquired rights arising from their status which were destroyed by the new law. On the other hand, a new law altering the law of intestate succession is not retroactive merely because it destroys the expectations of presumptive heirs to succeed to the estate of a living person. *Nemo est hæres viventis* (The living have no heirs).

But in order to reconcile this way of stating the nature of retroactivity with the dictâtes of common-sense much violence had to be done to the term "acquired rights." For example, if a legislature abolishes slavery and frees all present slaves, it undoubtedly destroys acquired rights. Yet we should not speak of the law of abolition as retroactive.

The more acceptable view is that presented by Le Comte de Vareilles Sommières in a well-known essay in the *Revue Critique* (e). The writer there lays down that if a new law destroys or modifies for the future one of our rights by reference to some past fact it is retroactive. But if it merely destroys a right it is not therefore retroactive. The fact that the right was acquired in the past does not make the law retroactive. The new law destroys it for the future only. Le Comte de Vareilles Sommières gives numerous examples to illustrate his point. Thus a law which provided that no person who had abstained at three successive elections from exercising his right of suffrage should be entitled to vote at ~~a~~ future election would be retroactive if abstinence in the past were allowed to count. But a law which deprived of the right of suffrage all persons who were not owners of property of the annual value of P.T. 500 would not be retroactive though it might destroy an acquired right. For it destroys the right in itself, not by reference to any past fact. M. Planiol (f) adopts a similar formula. A law, he

(e) *Revue Critique* (1893), pp. 442, 492 ff.

(f) "Traité de Droit Civil," § 243.

says, is retroactive when it refers back to something which has previously happened in order to determine the legality of a transaction (g) or to destroy or modify rights already acquired. But it is not retroactive merely because it modifies the future effect of some transaction even though the transaction has already occurred. A law abolishing slavery is not retroactive in spite of the fact that the slave was bought before the law was made, because the new law does not make the sale illegal but merely alters its future effect. But if the new law penalized all persons who had bought slaves at any time it would be retroactive, because it would appreciate the legality of a transaction by reference to some past fact.

The nature of the facts governed by many rules of law makes the application to them of the principle of non-retroactivity very difficult.

It is, indeed, often said that the rule denying retroactive effect to law only applies to rules of substantive law. Rules of procedure, *i.e.*, adjective law, are retroactive. By this is meant that the procedure according to which any case is tried must be that in existence at the time of the hearing of the case and not that which existed when the facts arose. This is so obvious as hardly to need justification, though in actual practice it will be found that many exceptions need to be made.

Possibly, however, this exception to the general rule of non-retroactivity is more apparent than real, for laws of procedure are only intended to govern process, not to regulate rights. A new rule of procedure is held, therefore, to apply to all proceedings taken after it came into force without

(g) Compare the Assurance Companies Act, 1909, sec. 36 (2), by which certain assurances effected *before* the Act which were illegal at the time at which they were made were legalized retroactively.

See also the Increase of Rent and Mortgage Interest (Restriction) Act, 1920, sec. 5 (3).

regard to the date at which the facts arose which form the ground of the proceedings. If, however, as happens in some cases, a change in the law of procedure injuriously affects the position of the parties, special exceptions have to be made to prevent rights being affected by it. Thus, if a right of appeal is abolished by a new law, this abolition is generally held not to deprive the parties to existing proceedings of the right which they had under the old law (*h*).

Perhaps the part of the law which equity most clearly demands should be non-retroactive is that which defines criminal offences and provides for their punishment. To inflict punishment upon a man for an act not punishable at the time of its commission or to inflict heavier punishment than the law then permitted, shocks the moral sense. Yet Criminal law may be and is sometimes made retroactive for the benefit of the offender. The Egyptian Native Penal Code provides (art. 5) that if a law more favourable to the accused comes into force after the commission of the offence, but before final judgment, such law shall alone be applied. The law, then, is made retroactive when it favours the accused though the same article expressly lays down that as a general rule "offences shall be punished in accordance with the law in force at the time at which they are committed."

But the most difficult problems raised by the rule denying retroactive effect to law are those which arise in connection with rules of law which regulate the effect of a continuing state. As an example may be taken the law fixing the age of majority. A new law may raise the age of

(*h*) When the right of criminal appeal was in effect abolished in Egypt by the institution of the Assize Courts, a date was fixed from which the new law would apply to every criminal case of which a criminal tribunal had not then cognizance (Law, 12th Jan., 1905, art. 54). According to a slightly different theory the right of appeal is not acquired until delivery of the judgment (cf. O. B., VIII., No. 15). See Grandmoulin, "Droit Pénal égyptien indigène," §§ 168, 169, for the application of the principle in Egypt.

majority from (say) twenty-one years to twenty-five years and thus affect the legal validity of acts done by persons between the ages of twenty-one and twenty-five. For, as will be seen in greater detail later, a person's legal capacity to perform certain acts is affected by his minority. The problem at once arises whether persons who are above twenty-one but under twenty-five at the time when the law comes into force are thrown back into minority until they reach the age of twenty-five, or whether since they have attained majority under the old law their condition is not to be altered by the new law. It need only be said here that the general opinion of French authors is in favour of the first view (i). Transactions already entered into by persons thereby thrown back into minority would not, of course, be affected.

This case is, however, only quoted as one of the simplest examples of the difficulty which occurs whenever a new law alters the conditions for the existence of a continuing state. It is not necessary to expound these in greater detail. What has been said will prepare the student for the problems of this species which he will encounter in the study of his own legal system.

In studying the extent to which law is retroactive a distinction has to be drawn between written (enacted) and unwritten (unenacted) law.

In the case of unwritten law based, say, on custom, precedent, or scientific opinion it is difficult to state at what moment the rule which is applied commenced to exist. In enforcing a customary rule as a rule of law the Courts do not make new law, but only recognise as law that which has by force of usage become such. So also a judge following precedent is not deemed to make but to apply law, although it may well be that the application is so unexpected as to amount to new law. For this reason law made by judicial

(i) Cf. Planiol, I., § 260; Vareilles-Sommières in *Revue Critique* (1893), *loc. cit.*

decision has often been attacked as *ex post facto*, that is to say, as made after the facts have arisen which it is held to govern (*k*). The same difficulty is present in the case of law which has been developed by the authority of scientific opinion.

In all these cases it is impossible to fix any date at which the new rule of law came into force, for the rules which are, in expression, new are deemed to be only inferences from long-recognised principles and consequently must be assumed to have always been law. Yet it is quite clear that, in the beginning, not even the most ingenious person could have inferred the rules of classical Roman Law from the XII. Tables, or the modern English Common Law from its alleged origins in mediæval English custom.

But it must not be assumed that this difficulty is confined to unwritten law. Any body of written law which has existed for a considerable time must be made the subject of a process of interpretation by which its true meaning in application to actual facts is explained. The writings of jurists and the decisions of the Courts soon come to form what is, in practical effect, a mass of unwritten law expounding and elaborating the words of the legislator. These difficulties can probably never be wholly avoided, though the careful drafting of laws will prevent the more serious ambiguities and uncertainties of meaning. The interpretation of written law by the Courts may thus long remain in a state of uncertainty, more especially in France and Egypt and generally

(*k*) Cf. Austin, Lect. XXXIX. (Vol. II., pp. 673 ff.).

In fact, no doubt, English judges do make new law when they decide a case of first impression. But the rule thus made would be treated as governing also the legal effect of facts which occurred before the case had been brought and decided. The judges have never claimed the right to legislate, *i.e.*, to make new rules for future cases, but only the right to declare what the law is. Mr. Gray (*op. cit.*, §§ 484, 545 ff.) gives American examples of the adoption of the opposite view, but I am not aware that the English Courts have ever acted upon it.



in countries in which the judicial decisions are not authoritative except for the case in issue. And there is always a chance that a Court will not approve even the most constant jurisprudence. And though interpretation by the Courts cannot be properly said to have retroactive effect, yet in fact interpretation in some particular case may be so contrary to popular or professional impressions as to have much the same effect as in *ex post facto* law.

But this very uncertainty in interpretation has its own difficulties. As we have already seen attempts have often been made to give certainty of interpretation by reserving the final decision to the legislative body. Laws of interpretation operating only prospectively are unobjectionable, and indeed necessary in countries in which the judicial interpretation is not treated as authoritative. But to go further, and to make a declaratory law which is to be regarded as fixing the interpretation of the previous law as from the date of its original promulgation, is open to many objections. That the legislature, acting within the limits of its constitution, may have the right to make such laws, is not doubted. But to exercise it is in reality to legislate for the past. If, indeed, soon after the promulgation of a law it appears that there exists genuine uncertainty as to the meaning of its provisions, it may be useful for the legislator to intervene and declare the true meaning. And provision is sometimes made for the reference of such difficulties to the legislator (*référé législatif*), so that his attention may be drawn to the necessity of legislation (l).

(l) In France and Continental countries generally the Courts cannot interpret the law except for the purposes of the case in issue. Normally they have exclusive authority for the interpretation of the law for the purposes of a suit pending before them. But the interpretation then given is not law (it is said) but only the application of law. An authoritative interpretation which will be binding in all cases can be made by the legislator alone. Compare art. 28 of the Belgian Constitution: "L'interprétation des lois par voie d'autorité n'appartient qu'au pouvoir législatif," and, for other examples, *Revue du Droit Public* (1908), p. 466.

And a law thus made may be held to govern cases which have arisen but have not been decided before the promulgation of the law of interpretation. However, the use of this legislative interpretation may easily become an abuse and should be sparing. For although not technically retroactive (*m*), declaratory laws may in fact alter the meaning attributed by most people to the provisions of the original law, and thus change the assumed legal effect of facts which have occurred before the new law was promulgated.

An extraordinary instance of a law of interpretation thus in fact retroactive is furnished by the recent history of ecclesiastical legislation in France, and provided the text for the essay by M. Barthélemy already referred to. In that case all the vices of a retroactive law seem to have been combined. The French legislature made a law of interpretation to govern cases actually pending in the Courts between private persons and the state, and although the new law was called interpretative only, there was not really any dispute as to the meaning of the original law, or (*semble*) as to the fact that the legislator in making the new law was really providing for a case which had been overlooked when the original law was enacted. In fact the intervention of the legislator was justifiable only on ground of public interest and as to the practical necessity of the intervention in a matter exclusively French, Frenchmen are the best judges (*n*).

*Repeal and Obsolescence of Law.*—The repeal of written law is effected by the express abrogation of the existing law

(*m*) M. Barthélemy in *Revue du Droit Public* (1908), pp. 486-7. And cf. O. B., VIII., No. 3.

(*n*) See the essay of M. Barthélemy. Compare for a somewhat similar retroactive division of property the history of the "Scotch Church" Case. In that case property finally adjudged by the House of Lords to community A was under a new law (5 Edw. VII., cap. 12) divided between community A and community B (the unsuccessful party in the litigation). But here again public interest demanded the intervention of the legislature.

or by the enactment of a new rule which tacitly annuls the old one. In order to avoid all difficulties the exact scope of the new rule needs to be clearly defined, otherwise doubts arise as to the extent to which the operation of the previous rule is annulled. Another question relating to this question of repeal which has provoked much discussion has reference to the effect of long-continued non-observance upon a rule of law. On principle a law cannot be regarded as repealed merely because it is not enforced, although a law which is in fact never observed has but a shadowy claim to the title. Thus an English Act of 1372 disqualified lawyers from sitting as members of Parliament for county constituencies. The Act was not enforced, although it was not actually repealed for 500 years (o). Again, by the Act of Uniformity of 1558, a fine of one shilling was imposed upon all persons who did not attend church on Sundays, and this provision was not expressly repealed until 1846, though it had long fallen into desuetude. Strictly speaking, it cannot be said, however, that these laws did not exist prior to their repeal, except so far as subsequent and really inconsistent legislation might be held to have tacitly abrogated them.

Some Continental jurists, indeed, have held that an enactment can be repealed by the effect of contrary custom, and this would appear to have been the doctrine of the Roman law. Savigny was an adherent of this opinion, and the important part which popular usage plays in his theory of law makes his adherence easily comprehensible. But in France at any rate the bulk of the authority is in favour of the view that written law can only be abrogated by law of the same character (p).

(o) Repealed by Statute Law Revision Act, 1871.

(p) Planiol, I., §§ 231, 232. The contrary view is taken by Beudant in "Cours du Droit Civil," Introduction, § 105. The subject is discussed in Gray, *op cit.*, §§ 400 ff. The Mejlle lays down (art. 39), "With the change of time it cannot be denied that the laws are changed."

## § 3. TERRITORIAL AND PERSONAL APPLICATION OF LAW.

It is a principle followed in modern European states that there exists within the country but one body of law applied by all the Courts alike within the limits of their respective jurisdictions and to all cases which arise without respect to the origin, religion, or other personal peculiarities of the parties. Special circumstances have created many exceptions to the application of the principle in Egypt. As a consequence of these exceptions the nationality and religion of the persons concerned determine to a considerable extent the law which will be applied to their affairs and the Courts which will have jurisdiction over them. Nor is Egypt peculiar in this respect, though in few countries are there exceptions of greater number.

The application of the European principle results in the conclusion that a person who changes the country in which he lives changes also the law to which he is subjected. An Englishman who goes to live in France is subjected to the rules of the French law and the jurisdiction of the French Courts. All the Courts in France are French, and these Courts apply only French law, and apply it to Englishmen as well as to Frenchmen, to Mohammedans as well as to Christians.

This broad statement as applied either to France or any other European country must indeed be taken subject to certain limitations. Laws creating public privileges, such as the right to vote or to be elected a member of a governing body, and some laws imposing public duties, such as military service, apply only to citizens or subjects of the state. Some states, moreover, punish their subjects for breaches of their own criminal law, even though these be committed abroad (*q*), but they are careful also to punish such breaches by foreigners when committed within their territory.

(*q*) For examples see F. C. I. Cr., art. 5; N. P. C., arts. 2, 3.

In England it is a general rule that offences committed by British

Exceptions of a different kind are also supplied by the rules of Private International law, according to which the Courts of one country may adopt the rules of the law of another when called upon to decide cases in which some foreign interest occurs. In accordance with those rules the French Courts may sometimes adopt rules of (say) English law to decide a point at issue when equity and convenience demand it. But the exceptions introduced by Private International law are at least not based on any difference in personal law due to religious considerations. However, on the continent of Europe the prevalent view is that questions of status and capacity as well as the succession to movables should be governed by the law of the person's nationality, and it may therefore be said that Frenchmen, Englishmen, Germans, and so on are treated as possessing a personal law proper to each of them. This doctrine appears to be the outcome of the strong sentiment of nationality which has been so important a political influence during the last eighty years (r).

In spite of these real or apparent exceptions it may be laid down as a general principle that law in Europe is administered upon a territorial basis. In each country there exists but one set of Courts which administer the same law for all persons within the territory (s). And this

subjects out of England are not punishable by the English Criminal law, but there are sundry exceptions (see Stephen, "Hist. English Crim. Law," II., pp. 14-16).

(r) In England the law is less personal in character than on the Continent. For while Continental jurists decide questions of status and capacity by reference to the law of a person's nationality, in England these matters are regulated by the law of the person's domicile. See for a somewhat exaggerated comparison between the Continental rule in this respect and the "personality" of Mohammedan law, Syed Amir Aly, "Mohammedan Law," II., pp. 146 ff.

(s) It by no means follows that the law is the same in every part of the same state. The modern state is indeed tending to become homogeneous in this respect. Modern France and Italy and Germany

law is for the most part limited in its application to the territory alone. According to the usages of contemporary Europe, a person is regarded as rightfully subjected to the laws of the country in which he is, and, with certain exceptions, to them only.

The difference between this state of things and that which exists in Egypt is obvious. In Egypt are to be found many examples of the application of law on the opposite or personal principle, people being entitled to have applied to their affairs a law which is peculiar to them by reason of their nationality or religion. The contrast may be easily illustrated by striking examples. If a foreigner commits a criminal offence in England he is tried and punished by the English Courts in accordance with English law, whether his victim be English or alien, even though he belong to the nationality of the criminal. In Egypt he would in most cases be tried and punished by his own Consular Court in accordance with his own law, whether the victim was an Egyptian or a foreigner of any nationality. If a foreigner hired a house in England his contract would be governed by the English law and the ordinary English Courts would have to decide any dispute which arose between the parties. But in Egypt such a matter would be governed by the law of the Mixed Courts. If a Mohammedan married in England according to the rites of his religion, the English Courts would not recognize his marriage as valid, because it would

each now possess a uniform body of Civil law, applicable in all the Courts of the state, but in the case of France, this consummation was only attained at the time of the Revolution, and in that of Germany the uniformity dates from the coming into force of the new Civil Code in 1900. In the United Kingdom there exists a diversity of law, England, Wales, and Ireland following English Common law, while Scotland has her own peculiar system. Even such small places as the Isle of Man and the Channel Islands have for certain purposes their own peculiar system of law. These latter, however, are not strictly part of the United Kingdom, but dependencies thereon.

not comply, as to form, with the terms of English law, and the only Courts in England competent to decide the question of its validity would be the ordinary Civil Courts of the country. If the marriage complied in form with the English law it might be valid in England even although, according to the law of his religion, it was utterly invalid (*t*). In Egypt the law governing the marriage of local subjects depends upon the religion of the parties, and the religious Courts are the only Courts competent to decide the question of validity.

The dominance of the territorial principle in the application of modern law is due to existing political conditions. The civilized world to-day is divided into a number of centralized states, each of which is established upon a particular territory. These states have succeeded to the civilization and adopted the religion of the Roman Empire. Long-continued intercourse and community of religion and of social institutions have given rise to feelings of confidence between the different peoples which make easy the application of law on a territorial basis. Countries of widely different history, untouched by direct Roman influence, are now conforming themselves to European standards and claiming the right to enter into the family of nations.

Within the Roman Empire also, law had become territorial in character. But in the earlier days of Rome this had not been so, for the *jus civile Romanum* was primarily the law of Roman citizens only. The extension of Roman citizenship to all inhabitants of the Empire, however, changed a personal into a territorial law.

(*t*) *Chetti v. Chetti*, [1909] P. 67. The rule generally accepted in England makes capacity depend upon the domicile of the parties to the marriage; but the English law declines to recognize incapacities under the law of the domicile which are obnoxious to English ideas. See Prof. Dicey in L. Q. R., 1909, pp. 202 ff. Continental views are in accord with the English law in this respect (see The Hague Convention on the Law of Marriage, printed in the Appendix to Meili's "International Private and Commercial Law").

After the Roman Empire broke up, law was for many centuries again applied on a personal basis. In the new kingdoms carved out of the imperial dominions by the barbarian invaders several different systems of law often existed side by side. To the Roman provincials the Roman Law was applied, and the members of each tribe of invaders made use of their own customary law. In the great Frankish kingdom which flourished and extended from the sixth to the ninth century, this personal theory of the application of law was carried to its extreme results. The kingdom included members of many different tribes, such as Salian and Ripuarian Franks, Burgundians, Alamans, and Bavarians, besides, of course, large numbers of persons of Roman descent. Thus Agobardus, Bishop of Lyons in the ninth century, states that often five men walking together might be found each to be governed by a different system of law (*u*). The system gave rise to many difficulties in case of mixed process. In such cases the rule usually followed was that the law of the defendant was to be applied.

It must be remarked that in spite of the diversity of law at this epoch there existed a unity of Courts. One set of Courts administered all the different systems at once. In time the Roman and customary law amalgamated and became the modern Roman law of to-day, and the unification of the law made possible the application of one and the same law to all inhabitants of the country.

It is in the East that applications of law on a personal basis are most common to-day. The religious character of the law of Eastern peoples is mainly responsible for this. In many Eastern countries, however, a compromise has been effected between the two principles, so that while as regards many matters there exists but one body of law applicable to all subjects alike, as regards others the religion of the parties is taken into account and their religious

(*u*) Esmein, "Histoire du Droit français," pp. 51-59.



law exclusively applied to determine the question at issue.

It would appear that Moslems regard that part of the Sacred Law at least which regulates marriage, guardianship, succession, and religious trusts (waqfs) as having so peculiarly a religious character as to be obligatory for them in any event. So far as these matters are concerned it is the duty of the ruler to abide by the rules of the Sacred Law when dealing with Moslems. As regards other matters they are prepared to obey other rules than those of the Sacred Law, so far at any rate as these do not conflict with religious precepts. As worked out in actual practice in Egypt, India, and Turkey, this has resulted in the application of the Mohammedan law to matters which are thus regarded as of a religious character, if the parties interested are Moslems, and the introduction as regards other matters of rules of foreign law. In Turkey, indeed, the Civil Code is based on the Sharia, and the Land Code is Turkish in character, and both in Egypt and India certain Mohammedan institutions, such as pre-emption, are in use (x). These latter are, however, of general application and form part of the ordinary territorial law. As a personal law applied exclusively to Moslems the scope of the Sacred Law in these countries, as also in Algeria, is limited to the family relations, personal and proprietary, and to waqfs.

So far as it is applied in Egypt, the Sacred Law is administered by religious Courts, which have for this purpose to be distinguished from the Courts of the state. In Egypt, however, the great majority of the native population is

(x) As to Egypt, see arts. 68-75 of the Native Civil Code, and Decree 23rd March, 1901, and for the Mixed Law, see Decree 26th March, 1900. As to India, see Wilson's "Digest of Anglo-Mohammedan Law," art. 9, where it is laid down that "the rules regulating the right of pre-emption are administered as a matter of justice, equity and good conscience to the extent and in the manner described in Chapter X. of this Digest."

Moslem, and the personal character of the law is therefore not so clearly shown as in countries such as India, where Moslems form a smaller proportion of the population.

Among the vast populations of India are to be found representatives of all the famous religions of the East. The majority of the people are adherents of Hinduism, but there exist a minority of Moslems, which, though small in proportion to the whole population, actually number, it is reckoned, more than all the Moslems in Turkey, Syria, Arabia, Egypt, and Persia put together. In addition to these there exist considerable numbers of Buddhists, Parsis, barbarian idolaters of different kinds, and sects of a more or less nondescript character. British rule extends over the whole of this population, but a certain control over their internal affairs is left to the sovereigns of protected native states. The legal system of that part of India which is directly under British rule is based on the unity of Courts for all the inhabitants of the country.

To a considerable extent the unity of Courts is coupled with unity of law. The Criminal law and the greater part of the Civil law are the same for all inhabitants of British India, whatever their colour, religion, or nationality. But the Courts apply the religious law of Moslems, of Hindus, or of Parsis, "to the relations of family life, marriage, succession to property, guardianship, the ownership and enjoyment of the family home, and religious questions so far as they can be entertained by Courts of law" (y).

The existence in British India of but one system of Courts causes a striking departure from the method in which the Sacred Law is administered in Egypt and Turkey. The special religious Courts which administer Mohammedan Law in Egypt and Turkey do not exist in British India. The ordinary Courts of the state interpret and apply

Mohammedan or Hindu Law, as the case may be, in any case in which such application is allowed.

The Bengal Regulations issued by the East India Company in 1772, in the early days of British ascendancy in India, had prescribed that "In all suits regarding inheritance, marriage, caste, and other religious usages and institutions the laws of the Koran with respect to Mohammedans and those of the Shasters with respect to Gentus (Hindus) are to be invariably adhered to, and on such occasions the Mulvis and Brahmins are to attend and expound the law." In fact, indeed, the Mohammedan Criminal Law and the Mohammedan Law of Contract were also largely followed, though now long since superseded by legislation on modern English lines. With respect to marriage, guardianship, succession, and waqfs the practice enjoined by the Regulations was continued in British India for nearly a century. When a question of religious law arose the judges of the State Courts consulted the muftis, although they themselves decided questions of fact and the decision was in their name. Steps were early taken, however, to enable the English judges to form their own opinions upon points of Mohammedan law. The Hedaya and other Arabic treatises were translated into English, and many Englishmen became accomplished students of the original Arabic authorities and published works in English upon the law. Moreover, collections of decisions given by the judges in accordance with the "fetwas" of the muftis were made. As time went on a trained native Bar came into existence, and many of its members were appointed to the Bench and have reached the highest offices (2). Consequently, in 1864, the Government abandoned the rule requiring the judges to consult the muftis, and since that time the Mohammedan law applied in British India

(2) Thus the Rt. Hon. Syed Amir Aly is a member of the Judicial Committee of the Privy Council, and Lord Sinha is Under Secretary of State for India.

has been administered entirely by the State Courts, the judges of which inform themselves of the provisions of the law with the assistance of the arguments of counsel. Sunni or Shia law is applied according to the persuasion of the parties concerned (a).

An interesting comparison may be made between the method in which the Mohammedan law is applied in India and that adopted by the French in Algeria. The French system is too complicated to lend itself easily to summary statement, but its general lines may perhaps be indicated. A distinction is drawn in Algeria between French subjects and French citizens. The Algerian native is not a French citizen unless he becomes naturalized as such. To French citizens French law applies in its entirety. It is administered by an organized system of French Courts. The native community is almost entirely Mohammedan, and the French rulers at first left untouched the jurisdiction of the native religious Courts, which, of course, applied the Mohammedan law. The necessities of the case have, however, gradually brought about a very great change. The steps by which this change has been effected cannot here be set forth (b). The result, however, is that at the present day the French law is applied as the common law of the country to all natives, certain stated exceptions being made in favour of Mohammedans. The present situation is clearly set forth in a decree of 1889: "*Ils (les musulmans résidant en Algérie) sont régis*

(a) See the Introduction to Wilson's "Digest of Anglo-Mohammedan Law" for an account of the administration of Mohammedan law in India. The scope of its application is succinctly stated in the Digest itself (arts. 5, 11, 13, 14). The last article lays down that every adult Mohammedan can choose the law by which he is to be governed at least as among the four Sunni schools.

(b) The history of the process is stated briefly in Charpentier's "*Législation Algérienne et Tunisienne*," pp. 189 ff. The situation in Algeria is complicated by the existence of varying jurisdiction in different parts of the territory, but the consideration of these would make a summary statement impossible.

par la loi française pour toutes les matières non réservées par l'article 1<sup>er</sup>, ainsi que pour la poursuite et la répression des crimes, délits et contraventions." The article 1 therein referred to provides that: "*Les musulmans résidant en Algérie, non admis à la jouissance des droits de citoyen français, continuent à être régis par leurs droit et coutumes, en ce qui concerne leur statut personnel, leurs successions, ceux de leurs immeubles dont la propriété n'est pas établie conformément à la loi du 26 juillet 1873 ou par un titre français, administratif, notarié ou judiciaire*" (c).

Thus the scope of the Mohammedan law in Algeria is much the same as in Egypt and India. The method of its administration is a compromise between the claims of the religious Courts and the French Courts. The French *juge de paix* is the ordinary judge in all matters, but his jurisdiction as regards questions relating to the "*statut personnel*" is optional for the parties. The "*statut personnel*" includes the law of marriage, and of succession and of matters arising therefrom. On these questions the parties may have recourse to the Cadi or judge of the religious Court.

But from the decisions of the *juge de paix* and of the Cadi there lies in all important matters an appeal to the French "*tribunal d'arrondissement*," and by special procedure in certain cases to the "*Cour d'Alger*" (d). Thus it is only in first instance, and then not in all cases, that the Mohammedan law is administered by religious Courts in Algeria. It may be surmised that the further step will ultimately be taken and the jurisdiction of the Cadi transferred to the *juge de paix*, but this could hardly be done unless the natives were accorded the large share in the judicial work of the country which is given them in India.

A further example of the application of law upon a

(c) Décret 17 avril, 1889 (D. P. '90-4-45).

(d) Décret 25 mai, 1892 (D. P. '93-4-20).

personal principle is furnished by the privileges and immunities granted by the sovereigns of the Ottoman Empire to their Christian and Jewish subjects. The religious origin of Mohammedan law necessarily hampers somewhat its application to adherents of other faiths, and in fact Mohammedan conquerors have in many cases imposed it only partially upon their non-Mussulman subjects. Other circumstances besides this induced Mohammed II., the Conqueror of Constantinople, to make an arrangement with the Patriarch of the Orthodox Eastern Church at the time of the conquest by which the Sultan conceded to the Church privileges of jurisdiction of a very wide character over the native Christians. Whatever the original extent of these privileges may have been, it is as regards marriage and inheritance that they have become most important. The privileges granted to the Orthodox Church were extended to other Christian communities, such as the Armenians, and also to the Jews. On the whole these privileges have been observed by successive Sultans, though exceptions have occurred. During the earlier centuries of Ottoman dominion such exceptions were the result of religious hostility, but in more recent years attempts to limit the privileges have been made under plea of the desirability of unifying the law for all Ottoman subjects. By the Hatti-Humayoun of 1856 the Sultan confirmed the jurisdiction of the religious Courts, but this confirmation has not prevented attempts to secure their reduction. The most striking of these was the struggle between the Sublime Porte and the Orthodox Church which ended in the Circular of 3rd February, 1891, by which the privileges of this Church were, within certain limits, again confirmed (e).

(e) The civil jurisdiction formerly exercised by the Patriarch and Bishops is now transferred to so-called Mixed Councils, that is to say, councils consisting of a president who is an ecclesiastic and four lay judges (see Young, "*Corps de Droit Ottoman*," II., pp. 13-15). For an account of the particular controversy referred to in the text, see also Young, *op. cit.*, pp. 17 ff., and for an account of the orthodox privileges

In Egypt the same privileges exist in consequence of the former incorporation of the country in the Ottoman Empire. Under the Turkish and Egyptian system the non-Mussulman subjects are organized into religious communities corresponding to the various Christian Churches. To each of these communities a constitution is granted by which certain powers of control and jurisdiction are granted to the respective ecclesiastical authorities. The religious head of each community acts as its representative before the Government.

Of these communities the most important in Egypt are those of the Orthodox Eastern Church, the Armenian Gregorians, the Orthodox Copts, the Greek Catholic Church or Melkites, and the Protestant Community, and to these may be added the Jews (*f*).

The Egyptian Government has exhibited the same tendency as that of Turkey in seeking to limit the privileges of jurisdiction of the Communities as far as possible. Art. 16 of the Decree for the Reorganization of the Native Courts excludes indeed from the jurisdiction of these Courts "disputes relating to the constitution of waqfs, to marriages and matters relating thereto, such as dower and alimony, to gifts, legacies and successions, and all other questions of the personal statute." These matters are within the competence

in Turkey, see Sir Anton Bertram in Jour. Soc. Comp. Leg., XXI, pp. 126 ff.

The break up of the Ottoman Empire which has resulted from the Great War has not affected the special position which religious law and jurisdiction occupies in the East. Moslem and Patriarchal Courts continue to sit and to apply their special systems of law within the limits previously recognized. This is so not only in Egypt, which is now a Moslem Sultanate, but in Syria where European rule has been established. The enjoyment of the privileges of Moslems in this respect in countries which are not now under Moslem rule, and of Christians in all the territories now separated from the Turkish Empire is based presumably on long-established custom.

(*f*) See generally as to the non-Mussulman communities in Egypt, Scott, "Law Affecting Foreigners in Egypt," pp. 261 ff.

of the religious Courts only, but the present tendency is to secure the submission to the Mahakem El Sharia of all questions of succession so as to give the Mohammedan law a territorial character. "It ought here to be remarked," says Sidarouss Bey, "that the tendency of the Egyptian Government to treat the Cadi as 'common law' judge in matters of Personal Statute for all Ottoman subjects is becoming increasingly obvious. This tendency has its origin in the letter of the 18th article of the Hatti-Humayoun (*g*) of 18th February, 1856. The terms of this article seem indeed to make the agreement of the parties a condition for ecclesiastical competence in questions of Personal Statute. In the absence of agreement to accept the jurisdiction of the patriarchal tribunal the parties must of course find some other Court to settle their differences; and what can this be if it is not the Court of the Cadi, or Mehkemeh Sharieh. True it is that the Mehkemeh is not a secular Court applying Civil law, but the religious court *par excellence* of Mohammedans applying exclusively the Sharia or Mohammedan law to the suits brought before it, and that the principles upon which the Mohammedan family and social systems are built differ considerably from those admitted by Christianity or Judaism; but still, the Mohammedan authority, secularized or not, is none the less the common law authority in Mohammedan countries in virtue of the principle of territorial sovereignty" (*h*).

(*g*) The article appears as No. 12 in the copy of the Hatti-Humayoun of 1856 given in Young, *op. cit.*, II., pp. 5-9.

(*h*) Sidarouss Bey, "Les Patriarchats," pp. 311, 312. The Mixed Court Reports contain numerous important decisions as to the scope of the Patriarchal jurisdiction. Compare in particular B. L. J., XVII., 57; XXIV., 173; Gaz. Trib., III., No. 425; IV., No. 209; VII., No. 462; IX., No. 227. In the last case a will had been annulled by decision of the Court of the Greek Orthodox Patriarch and the Mixed Court laid down, "que les patriarchats ne peuvent se prononcer en matière successorale que sur les questions qui leur sont volontairement soumises par les parties sujettes ottomanes."



There exists, moreover, in the Ottoman Empire, as also in certain other countries, a further exception to the territorial application of the law, that, namely, which arises from the Capitulations.

In the Middle Ages it appears that it was not unusual in Europe for states to permit foreign Consuls to exercise jurisdiction over the members of the foreign community resident within their borders (*i*). Thus in Constantinople before the Ottoman Conquest the communities of Latin Christians resident in the town were allowed to settle their own disputes according to their own law without recourse to the Courts of the country. The jurisdiction of foreign judges in such cases may be termed "extra-territorial" since it is exercised outside the borders of their own state. Extra-territorial jurisdiction of this sort was abandoned in Christian Europe as a consequence of the growth of intercourse and of confidence between the various nations. The capture of Constantinople by the Turks had not made any difference in the position of the foreign communities in the town, and the continuance of the privileges was the more necessary owing to the great difference which existed between the customs and laws of the new rulers and those of Christian peoples. These privileges were afterwards confirmed by Capitulations or Agreements between the Sublime Porte and various Christian countries whereby there was accorded to the subjects of those countries a limited exemption from the jurisdiction of the local Courts and the application of the local law, at that time the law of the Sharia. The first of these "Capitulations" was that entered into between Francis I. of France and the Sultan Soliman II. in 1535. It is clear from a study of the negotiations which led to this treaty that the

(i) Indeed, even Mohammedan countries appear to have obtained similar privileges for their subjects resident in the Far East. It is stated that traces of mediæval Mohammedan "consulates" are to be found in India and China.

innovations which it made were mostly of a commercial character. So far as the privileges of jurisdiction went it only generalized an already existing custom. By this Capitulation France obtained a privileged position in the Ottoman Empire, and aimed at becoming the protector of all Christian foreigners within its borders. However, at a later date the English (1583) and then the Dutch (1613) obtained similar privileges, and other Christian nations have followed suit (*k*).

Foreigners protected by these Capitulations were left to the jurisdiction of their own judges, namely, the Consular representative of the state in question. The precise limits of the jurisdiction have been much disputed, particularly during the last century. It was admitted that the Consular Courts had exclusive jurisdiction in civil, commercial, and criminal matters arising between persons of the same nationality. It was also admitted that questions of the personal statute (marriage, divorce, guardianship) must be taken before the defendant's Court, that the Consul of a deceased person alone administered his estate, and that the Consul only could declare a foreigner bankrupt. So also if a dispute arose between foreigners of different nationality, the competent Court was again the Court of the defendant, which would necessarily be one or other of the Consular Courts. The Ottoman Government had indeed disputed this solution as applied to criminal matters, but the Capitulatory Powers refused to admit an exception.

On the other hand, it was admitted by most, though not by all the Powers, that the Ottoman Courts were competent, in criminal cases when the alleged injury had been done to an Ottoman subject and in civil cases in which an Ottoman subject was a party. The presence of a dragoman of the Consulate of the foreigner concerned was, however, necessary

(*k*) See fully Péliissié du Rausas, "Le Régime des Capitulations" (2nd ed.), Vol. I., Introduction. Scott, *op. cit.*, pp. 182 ff.

at the hearing, and the judgment needed to be signed by him. The Ottoman Courts had also exclusive jurisdiction in cases relating to land. Moreover, Mixed Commercial Courts existed with a limited jurisdiction (*l*).

Each Court applied its own law, and the same helplessness which characterizes the Egyptian Government in attempting to legislate for foreigners affected also that of Turkey. But in Egypt the position of the Native Courts is even more unfavourable than in Turkey. The privileges granted by the Capitulations were, in that country, enlarged by custom so as to oust the jurisdiction of the Native Courts in every case in which the defendant was a foreigner protected by a Capitulation, even though the plaintiff was a native. This extension seems at first sight very unjustifiable, but it was no doubt justified by the circumstances of the time. "The principal cause," says M. Pélassié du Rausas, "was undoubtedly the defective organization of the territorial Courts of Egypt, the absence, indeed, in Egypt, of a judicial organization adapted to the international needs of the nineteenth century" (*m*). Thus in criminal matters the Consular Court came to be recognized as alone competent to try the members of its own nationality, and in civil matters the maxim "*actor sequitur forum rei*" (the plaintiff sues in the defendant's Court) was strictly applied. The Consular Court in each case applied its own law. The Egyptian Government at first acquiesced in these arrangements, but in time special difficulties became apparent. In particular, it was found very inconvenient to withdraw from the local Courts cognizance of petty police offences (*contraventions*) committed by foreigners. The police law of the various consulates, alone applicable to

(*l*) See as to the whole question of foreign jurisdiction in Turkey, Young, *op. cit.*, I., pp. 239 ff. The United States claims that accusations against American citizens are cognizable exclusively by the American consuls, even (*semble*) when the alleged offence was an injury to an Ottoman (Young, *op. cit.*, I., p. 253).

(*m*) "Le Régimé des Capitulations" (2nd ed.), Vol. II., p. 248.

foreigners, was not well adapted for Egypt, and the Egyptian Government had no power to impose penalties upon foreigners for breaches of its own police regulations. And in Civil matters the inconvenience was also felt strongly. If Ahmed (a local subject) sued Pierre (a Frenchman) before the French Consular Court the Court was only competent to determine Pierre's liability in the suit. Pierre could not counter-claim against Ahmed, because the Court had not jurisdiction to hear a suit against Ahmed. Many other difficulties arose, and with a view to putting them to an end negotiations were commenced between the Egyptian Government and the foreign states possessing Capitulations, which resulted in 1876 in the institution of the Mixed Courts (*n*). These Courts have both civil and criminal jurisdiction, and the law applied in them is that of the Mixed Codes, which as already mentioned are, in effect, abbreviated copies of the French Codes. Their civil and commercial jurisdiction is stated in art. 9 of the first part of the Decree of Organization. "These Courts shall have exclusive jurisdiction over all civil and commercial causes (not coming within the Law of Personal Status) between Egyptians and foreigners and between foreigners of different nationalities. They shall also have jurisdiction in all actions relating to real rights over immovable property between any persons, even persons belonging to the same nationality."

Article 4 of the Mixed Civil Code defines what matters are to be included within the law of Personal Status (Personal Statute). These are to be "questions relating to the legal status and capacity of persons and to the law of marriage, to the rights of natural (*i.e.*, intestate) and testamentary succession, and to guardianship" and curatorship. These are to remain within the jurisdiction of the "Personal Status" judge, that is to say, within the jurisdiction of the Religious Courts or (in the case of foreigners) the Consular Courts.

(*n*) For the history of the negotiations, see Pélissié du Rausas, *op. cit.*, Vol. II., pp. 274 ff.

The jurisdiction actually exercised by the Mixed Courts cannot, however, be completely understood without reference to the interpretation put by these Courts upon the articles. There is a tendency for new Courts to enlarge their competence, and the Mixed Courts have proved no exception to this. By the application of the theory of the Mixed Interest they have secured jurisdiction in many cases which are not, strictly speaking, "between Egyptians and foreigners or between foreigners of different nationality." The theory of the Mixed Interest is thus formulated by M. du Rausas : "La compétence des juridictions mixtes se détermine non pas uniquement d'après la nationalité des parties en cause, mais aussi et surtout d'après le caractère des intérêts engagés au procès ; dès que, dans le procès porté devant elle, un intérêt mixte apparaît manifestement, la juridiction mixte doit retenir l'affaire, alors même que les parties litigantes appartiendraient à la même nationalité indigène ou étrangère" (o). One of the most interesting applications of this theory is the extension of the Mixed jurisdiction to cover all Egyptian bankruptcies whenever any one of the creditors belongs to some other nationality than that of the bankrupt.

Reference should also be made to article 12 of the Decree of Organization, which provides that "claims by foreigners against a religious establishment (waqf) whereby they seek to recover the ownership of immovables which are in the possession of such establishment are not within the jurisdiction of the Mixed Courts." Thus these Courts cannot entertain actions of revendication (i.e., claims of ownership) brought by a foreigner against the Ministry of Waqfs, such actions must be brought in the Religious Courts. But the Mixed Courts have declared themselves competent to determine whether a waqf is valid or not when the question of its validity was raised by way of exception (p).

(o) Péliissié du Rausas, *op. cit.*, Vol. II., pp. 330-331.

(p) Arrêt 22 Jan., 1902 (B. L. J., XIV., 86).

The reforms of 1876 left to the Consular Courts the bulk of the criminal jurisdiction over foreigners.

Although a Mixed Criminal Code exists, yet in fact the Mixed Courts can only try offences of certain special kinds. The special difficulty encountered owing to the inability of the Egyptian Courts to try foreigners for breach of Egyptian police regulations was indeed met by subjecting them to the Mixed Courts in such matters. And jurisdiction was also given to these Courts in case of certain offences committed by foreigners or natives in connection with the work of the Courts themselves. Under a more recent decree they are also entitled to deal with criminal breaches of the law of bankruptcy (g).

In all cases other than those above mentioned, both civil and criminal, foreigners are subject only to their own Consular Courts, in which the law of their own country is of course applied.

Having regard to the complicated system of rival jurisdictions in Egypt it is not surprising that conflicts arise both as to whether a particular person is subject by reason of his nationality to the jurisdiction of the Native Mixed or Consular Court, and as to whether a particular matter is or is not a question of personal statute within the meaning of the articles above mentioned. Provision is made by the Decree of Reorganization of the Native Courts, arts. 80 ff., for the solution of such conflicts between the Secular and

(g) For the Mixed Criminal jurisdiction, see S. O. (Mixed), Part II., arts. 6-9; Decree 26th March, 1900. The statement in the text refers of course to the present situation (Jan., 1921). The proposal to transfer to reorganized Mixed Courts the criminal jurisdiction of the Consular Courts has not yet been accepted. But a new Penal Code has been prepared and circulated which will, if the transfer takes place, be applied by the Mixed Courts. This draft is more eclectic in character than the existing Mixed and Native Penal Codes; though partly based upon the existing Native Code it borrows largely from other systems, English and continental.

Religious Courts, and by arts. 22 ff. of the second Part of the Decree of Organization for Mixed Suits in case of conflicts in criminal matters between the Mixed and Consular Courts. But the institution of a general "Tribunal des Conflits" is undoubtedly desirable, though it has been found impossible up to now to propose a constitution acceptable to all parties (r).

On 9th September, 1914, the Ottoman Government issued a Note in which it declared that the privileges of foreigners under the Capitulations were thenceforth abolished. The Governments of the various Powers, France, Great Britain, Italy, Russia, the United States, Austro-Hungary, and Germany, at once protested, pointing out that the Capitulations were bilateral instruments, and that one party could not abolish them at its will (s). Shortly afterwards war broke out between Turkey and the Allied Powers. The final defeat of Turkey and her allies has naturally led to a claim for the re-establishment of the Capitulations. As regards such part of the Ottoman Empire as will remain under Turkish Government special provision has been made by art. 136 of the Treaty of Peace between Turkey and the Allies. Under this clause a Commission of four persons is to be appointed by the Governments of Great Britain, France, Italy, and Japan, and the Commission, with the assistance of experts representing the other Capitulatory Powers, is to formulate a scheme of judicial reform for Turkey. The Commission may propose either a mixed or uniform system. The formulated scheme is to be submitted to the Governments of neutral and allied powers concerned, and when approved by these is to be accepted by the Ottoman Government. Pending the coming into force of these arrangements

(r) See Jud. Adviser's Rep., 1901, for instances of such conflicts and for some account of the attempts made to provide an adequate *Tribunal des Conflits*.

(s) As to the abolition of the Capitulation by Turkey, see *Revue de droit international publique*, 1914, pp. 487 ff.; 1915, 139 docs. 66.

mixed Commissions have been set up in Constantinople for the trial of foreigners.

As regards the portions of the Ottoman Empire which have as a consequence of the war been annexed by other states or otherwise separated from Turkey several interesting questions arise. It may be plausibly argued that the Capitulations having been illegally suppressed by Turkey are now revived, and must be deemed binding upon all former Turkish territory, in spite of separation from Turkish sovereignty. On the other hand, it may be said that Capitulations are binding only between the parties and do not "run with the land." They cannot, therefore, avail against a new sovereign who has come to be possessed of territory formerly part of the Ottoman Empire.

There is precedent for the view that capitulatory privileges cease to exist when the administration of any part of former Turkish territory is definitely taken over by a European power. England has not recognized these privileges in the Soudan nor in Cyprus, Austria did not recognize them in Bosnia and Herzegovina, nor does Italy recognize them in Tripoli. So also Greece declared that the capitulations ceased to apply in Macedonia after its annexation by her. Moreover, when the detachment of territory from Turkey is effected by an international act the annulment of the capitulations as regards the territory detached would appear to be a necessary result, at least, as between the parties. In the Treaty of Berlin the privileges created by the capitulations were expressly reserved when the independence of Serbia and Roumania and the autonomy of Bulgaria were recognized by the Powers (*t*).

As regards Syria, Palestine, and Mesopotamia the ultimate arrangements will probably depend upon the degree of control which the mandatory power exercises over the judicial

(*t*) See arts. 8, 37, and 50 of the Treaty of Berlin. The privileges have since been abolished in Roumania and Serbia by general consent.



institutions of the country. In Palestine, at least, the privileges granted by the Capitulations are not now recognized, but in their place certain lesser rights not inconsistent with the unity of the Courts are allowed to certain foreigners. Thus European subjects have the right to demand that the Court before which they are tried shall include at least one British member, and in more serious cases the Court must have a majority of British members. Similar arrangements are made with respect to Civil matters. Foreigners, however, lose, though local subjects retain, the special privilege as to jurisdiction in matters concerning the personal statute, since the local secular Courts have been declared competent to deal with all questions of this kind, applying, of course, the personal (*i.e.*, national) law of the person concerned. If, however, the foreigner is a member of a religious community—Moslem, Christian, or Jewish—the Courts of which have jurisdiction in Palestine, he may, if he choose, submit the case to the decision of the Religious Court instead of proceeding before the secular Courts (*u*). The Religious Courts, of course, apply religious law only.

Egypt stands in a different position. No notice was taken there of the illegal suppression of the Capitulations by Turkey. The Consular Courts of Allied and Neutral countries continued to sit throughout the war, and the Mixed Courts, though deprived of their German and Austrian members, and forbidden to hear cases brought by enemy subjects, were not otherwise affected in their jurisdiction.

No doubt this was in part due to the fact that Egypt was occupied by one of the Allied Powers, and was early detached from Turkish sovereignty by the declaration of the British Protectorate in December, 1914. But it must also be remembered that the privileges of foreigners in Egypt have long rested rather upon established custom than upon

(*u*) Military Proclamation of Chief Administrator, O. E. T. A. (South), 24th June, 1918, and the rules of Court made thereunder.

the terms of any Capitulation, and that the Mixed Courts exist in virtue of special treaties made by the Powers with Egypt. During the war the privileges of foreigners suffered, indeed, some temporary curtailment by the operation of Martial Law. The expression Martial Law has several differing significations (*v*). In the sense in which it is used to-day in Egypt, it is a species of military dictatorship which, however, is exercised only for very limited purposes, of which the chief are : (1) the suppression of serious revolutionary outbreaks, if such should occur ; and (2) the restriction of foreign privileges. The continuance of Martial Law in Egypt must be justified from this point of view, for through it only can many coercive measures be taken against foreigners which would have been out of the power of the Egyptian Government acting alone. The compulsory imposition of a Ghaffir Tax and the application of the Restriction of Rent Law to foreigners were possible only because the country was still under Martial Law. Various proposals have been from time to time put forward with a view to the abolition or restriction of the privileges of foreigners in Egypt. That which now holds the field is that the protection of foreign interests in Egypt should be undertaken by Great Britain alone in the sense that Egyptian legislation should not be applicable to foreigners unless it had received the consent of the British Government or its representative. At the same time the present consular jurisdiction in criminal

(*v*) Martial Law may mean (1) Military Law, *i.e.*, law applicable to soldiers as such ; (2) dictatorship overriding the ordinary law of the land exercised by the superior powers of the state through the agency of the native armed forces in cases of grave civil disturbance or alien invasion ; (3) military dictatorships of an alien army in an enemy country occupied in the course of a war.

Martial Law in Egypt appears to fall under the second head. It was originally proclaimed in order to secure the control over foreigners which was necessary during the war, and to give those concerned with the military defence of Egypt adequate powers for the purpose.

matters and in matters of personal status would be transferred to reorganized Mixed Courts, the existence and proper working of which would be in a sense guaranteed by Great Britain. This proposal does not amount to an abolition of the privileges of foreigners, though it would alter the foundation upon which they rest, and render them far less harmful to native interests. The privileges would, thenceforth, rest not on the foundation of Turkish treaties and long-established custom, but on arrangement made between Egypt, Great Britain, and the group of states interested. And the Egyptian Government would in future have to deal only with the British Government when any question of foreign privilege was raised (*x*).

In Mohammedan countries outside the Ottoman dominions extra-territorial privileges are also enjoyed. This is the case in Persia (*y*). Consular jurisdiction in Tunis has, however, been abandoned upon the declaration of a French Protectorate and the establishment of French Courts (*z*), and a similar result has followed from European recognition of the French protectorate in Morocco (*a*).

It is not, however, only in Mohammedan countries that the extra-territorial privileges accorded by the Capitulations are now enjoyed. The system which had its origin in the

(*x*) The new Mixed Courts would, of course, be Egyptian Courts, as are the present Mixed Courts; but they would be regulated by a special law made with the assent of Great Britain, and only alterable with the like assent. So the law administered would form part of the body of Egyptian law, but would require the consent of the British Government as well as that of Egypt.

(*y*) As to Persia, see Hall, "Foreign Jurisdiction of the British Crown," p. 149. Compare also the arrangements made with the Sultan of Zanzibar (a British Protectorate) under the Treaty of 30th April, 1886 (Piggott, "Exterritoriality," pp. 282 ff.), and the Sultan of Muscat (Piggott, *op. cit.*, pp. 284-285).

(*z*) Piggott, *op. cit.*, pp. 268-270, 281.

(*a*) See *Revue Algérienne*, 1916, pp. 51, 52; *Journal de droit int. privé*, 1917, pp. 1632 ff.

contact between the different types of civilization and policy represented by Christendom and Islam has been applied in more modern days to govern the position of Europeans resident in the countries of the Far East, and even in Abyssinia, which is nominally a Christian country, foreign consular jurisdiction has been established. For in those countries the contrast between Western ideas of law and government and the local half-barbaric systems is even more profound than that which exists in the Ottoman Empire.

The principal states of the Far East with which European Governments have treaties giving such privileges are China and Siam. The rights of jurisdiction in these cases are of a broad character and cover both civil and criminal cases (*b*).

In Siam, indeed, the governing classes are rapidly adapting themselves to European usages, and European law has been largely adopted, but the country has not yet reached a condition which the European Powers would regard as justifying them in the abandonment of their treaty privileges. The European Consular jurisdiction formerly existing in Japan has, however, been surrendered during the last twenty years with apparently satisfactory results (*c*).

(*b*) For the English treaties, see Piggott, *op. cit.*, Appendix.

(*c*) Moore, "International Law Digest," II., 660.

## BOOK II.

### *LEGAL RIGHTS AND DUTIES.*

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#### CHAPTER VIII.

##### ANALYSIS AND CLASSIFICATION OF RIGHTS.

##### § 1. RIGHTS AND DUTIES.

IN this and the succeeding chapters it is proposed to discuss the elements of which a legal right is constituted and the principal kinds of rights recognized by law. Attention will, for the most part, be confined to those rights which are in Egypt governed by law of European origin. The nature of a right has already been explained (*a*). In this book it is with legal rights alone that we are concerned, and although much that may be said of them is also applicable to rights of all kinds, no special reference will be made except to those rights which fall within the sphere of the law.

Legal rights are of very varied character. An elector has a right to vote, a creditor has a right to be paid, an owner of land has a right to the unmolested enjoyment of the land ; every person has a right to enjoy personal security within the limits of the law ; even the accused criminal has, under modern legal systems, a right to be tried according to law. Whenever the law protects a man in the enjoyment of some claim or interest it confers upon him a legal right. The withdrawal of the protection of the law destroys the

(*a*) See above, pp. 66 ff.

legal right, though there may, of course, still subsist a right justified by the precepts of the moral law.

In order to maintain one man's legal right the law imposes upon others a corresponding legal duty. Thus, if one person has a right that something shall be done, this implies that there is a duty imposed upon another or others to do this thing. A breach of such a duty is a wrong. To the breach of duty the law attaches a sanction and, by so doing, protects the holder of the right in its enjoyment. Thus, if Ahmed buys a horse from Zaky for £50, Ahmed has a right against Zaky to delivery of the horse and Zaky has a right to be paid the £50. To Ahmed's right to delivery corresponds a duty on Zaky's part to hand the horse over, and to Zaky's right to receive payment corresponds Ahmed's duty to make it. And if Ahmed, for example, does not make the stipulated payment, the law protects Zaky in the enjoyment of his right by compelling fulfilment of the duty.

Generally speaking, it is not difficult to say upon whom the duty corresponding to a right is imposed. It is imposed upon all persons, against whom the right is available. Sometimes the right is available only against one person, as in the example just given. Sometimes, however, the nature of the right makes it necessary to impose the duty to observe it upon all members of the community. Thus to the right of an owner to the enjoyment of the thing owned corresponds a duty imposed upon all persons not to interfere with such enjoyment. Any person who does so interfere commits a legal wrong.

Many duties imposed by the law are so imposed, not in the interest of individual members of the community, but in that of community as a whole. To these duties correspond rights possessed by the community. And the community may itself be subject to duties which the law has imposed for the benefit of an individual who thus possesses a right

against the community. Rights and duties thus held by or imposed upon the community are usually spoken of as held by or owing by the state. Rights and duties are, in truth, only held by or owing by human persons for the law regulates only human conduct, but for convenience' sake the law here treats the state as if it were itself a person. So also the rights and duties of a municipality are really those of the townspeople, but in this case also we speak of the rights and duties of groups of people which are attributed to them as a group as being the rights and duties of the group itself, giving the group the name and functions of a person in law (b).

Great difficulty has been found in explaining how the state can have legal rights and duties. Whatever may have been the case under older forms of government there can be no doubt that the modern state is a "law state," *i.e.*, it is not above the law but is subject to it. Yet if we hold, and rightly hold, that law is ultimately founded on Force and that the Force which upholds the law is the Force of the state, it seems inconsistent to speak of the state as itself subject to the Law (c). Thering found the solution of the dilemma in the self-subordination of the state to the Law (d), a self-subordination which is strictly necessary if the state is to fulfil its functions as upholder of the Law. The text suggests a somewhat different point of view. The state is after all only a fiction of the law. It is not really a person

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(b) Group personality, *i.e.*, the attribution of personality in law to a group, is further discussed below (Chap. X.). The rights and duties of the community regarded as a collective whole must, however, be distinguished from rights and duties common to all members of the community. All persons are under a duty to obey the Criminal Law, to pay taxes, etc. So also all persons have a right to the use of public roads, to the services of officials, etc. These duties and rights are common to all members of the community but are not attributed to the community itself. On the other hand, the right to exact payment of taxes accorded by the law or the duty to carry out contracts are attributed to the community as a collective whole, *i.e.*, to members of the community only as members of a group.

(c) Cf. Austin, Lect. XVII. ; Markby, "Elements of Law," §§ 154-158.

(d) Cf. pp. 200-201 above.

at all. As in the case of other juristic persons the rights and duties attributed to the state are really those of the members of the group considered as a group. The organs or state authorities which lay down and enforce the law act, at least in the modern democratic state, as agents of communal interests (e). It is not they who are the holders of state rights though their position may enable them to abuse them. Communal, i.e., state, rights and duties are created by law and enforced usually by the same methods as are other rights and duties. The dependence upon one another of the various state organs of authority may cause a risk that state duties will be the less rigidly enforced, a risk which some constitutions sought to minimize by a separation between the legislative, executive, and judicial authorities. But experience shows that the risk is not great. A right does not, however, cease to be a legal right merely because there is a risk of partiality in its enforcement. In intention, the force wielded by the state authorities is to be used both for controlling the action of the state authorities and that of individual members of the community.

Every phase of our legal life may be explained in the terms of legal rights and duties. The life of the law consists in the enforcement of claims made by human beings against human beings. But though this is so, yet some aspects of our life under the law are more naturally thought of as liberties to act or powers to give legal efficacy to our acts than as claims to control the conduct of others.

*Liberties and Powers.*—A legal liberty consists in the security given to us by the law to act as we please within the limits of the liberty accorded. When, for example, it is said that a man is at liberty to wear whatever clothes he pleases so long as he does not offend public decency, or to chastise his children in moderation for their faults, the idea dominant in the mind is that such action is within the scope of a man's activities left free to him by the law. It is his freedom of action in these respects which is directly emphasized. Yet such liberties of action when they constitute legal rights do nevertheless correspond to duties imposed upon others. For the statement that the law leaves a man free to act as he pleases implies that others are under a duty not to interfere with his action.

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(e) Cf. Amos, "Systematic View," p. 77. This conception of the state is not limited to the democratic state. It is essential to the idea of the state in our present political philosophy.



Thus in the matter of dress, if an Egyptian sheikh appeared in the streets of an English country town in his accustomed costume he would undoubtedly be the object of much attention, since a diversity of dress would be far more noticeable there than in so cosmopolitan a town as Cairo. Yet he would be entitled to the protection of the law, and interference with his freedom of action would be a legal wrong. So again a child is presumably under a duty to submit to proper chastisement though its duty may be only the passive one of accepting the application of the force requisite to secure submission. If Ahmed assaults Zaky the latter is entitled to resist, but if Ahmed uses similar violence against his son by way of proper chastisement, the son is not entitled to resist and, would, strictly speaking, commit a legal wrong if he happened to injure his father in self-defence. It is his duty to submit.

Again in the case of some legal rights the feature most prominent is the legal effectiveness given to some act done by the holder of the right. It is his power to accomplish some legal result which is directly emphasized. When, for example, it is said that a man has a right to make a will the idea dominant in the mind is that the will which he makes will be made effective by the law, since its dispositions will be enforced through the Courts. Yet powers such as these are only effective because the law imposes upon others a duty to accept their consequences. It is because the law is prepared to compel others to abide by the provisions of the will that the power of making a will has a legal character. It is a legal right because others are under the duty not to interfere with the carrying out of its provisions (*f*).

## § 2. THE ANALYSIS OF A RIGHT.

The existence of a right demands, on the one hand, a person who is its holder, and who is usually termed the *person of inherence*, and, on the other, a person against whom it is available, termed the *person of incidence*. It is upon this latter person that the duty corresponding to the right is imposed.

Rights can only be held by persons and be available against persons. Animals and things cannot be the holders of rights or owe duties. It is true that people sometimes use expressions contrary to this dictum, more particularly

(*f*) As to liberties and powers, see Salmond, pp. 193-197.

by speaking of the rights of animals or of duties toward animals. But law in all its forms regulates only human relations. The duty of showing humanity to animals is perhaps a religious duty owing to God, or perhaps a moral, or legal, duty owing to ourselves (*g*) or to other members of the community, or to the state as representing them. The animals themselves are outside the field of law, and, therefore, outside that of right.

As already remarked, every right consists in a claim that others shall do or shall abstain (forbear) from doing acts. These acts or forbearances form the contents of the right. The content of the right of a lender to the repayment of the loan is the act of repayment, and the content of the right of reputation possessed by all citizens is the forbearance by others from the use of expressions reflecting upon such reputation.

Rights are frequently available in respect of some thing which is their object. The term "object of a right" is used in a variety of senses which need to be distinguished from one another. Sometimes it is used to mean the purpose for which right is given. Thus the object of the right of reputation is the protection of a man's reputation (*h*). As used here, however, it means the thing of which the enjoyment is secured by the grant of the right. The object of the right of reputation is therefore the reputation itself (*i*). It is, however, more convenient to limit the idea of the object to

(*g*) To speak of a duty as "owing to oneself" seems absurd, though the phrase is common in current speech. It is, however, difficult to describe otherwise ethical duties which are purely self-regarding. The "self" to which moral duty is spoken of as owing, is the higher self to which the lower self must be kept in subjection. With even greater apparent absurdity men often speak of owing a duty to the law, to their consciences, and the like. In all these cases the same duplication of the moral being is implied.

(*h*) It would be more accurate to say that the protection of the reputation is the object (*i.e.*, purpose) of the grant of the right.

(*i*) Salmond, p. 191.

material things, since it is these alone which are treated as things in law. We shall see, indeed, in a later chapter (*k*) that the notion of the thing in law is not strictly limited to material objects. This extension, however, has never gone so far as to include under the head of "thing" such abstract ideas as reputation and the like. Rights to their enjoyment are better described as having no object.

The essential constituents of a right are, therefore, a person of inherence, a person of incidence, and certain acts or forbearances which form its contents. Whether or not the right should be described as having an object will depend upon the character of the thing in respect of which it is enjoyed. Rights, however, may be studied not only with a view to the separation of their constituent parts, but for the purpose of ascertaining the causes which produce or annul them. These two differing points of view may be adopted in the study of most subjects of human interest. For example, the anatomist examines the existing structure of the body, while the biologist seeks to trace the process by which that structure has been produced. Dr. Holland has thus distinguished the study of the right at rest, *i.e.*, the analysis of its structure, from that of the right in motion, *i.e.*, the examination of the circumstances under which it is created, transferred, or extinguished (*l*).

The creation, transfer, and extinction of rights takes place upon occurrence of facts (*m*). The fact of birth brings into existence a bundle of rights for the new-born child; the fact of death in the same way extinguishes many of the rights of the deceased while it transfers others to his successors. The claim to be the holder of a given right must therefore be

(*k*) Chap. XI.

(*l*) Holland, Chap. X.

(*m*) Some writers distinguish in this connection between *Investitive Facts* (*i.e.*, facts by which rights are created), *Translative Facts* (*i.e.*, facts by which rights are transferred from one person to another), and *Extinctive Facts* (*i.e.*, facts which cause rights to cease).

based upon the occurrence of certain facts which have caused the right to vest in the claimant. The facts of which the occurrence has invested any right in a person are termed the title to the right. A demand that a person shall show what title he has to hold a certain right is fulfilled by his proving that facts have occurred which have the effect in law of vesting that right in him.

A very large part of the law consists in the enumeration of the facts upon the occurrence of which rights are set in motion. These rules are naturally general in character. They state that whenever such and such a fact occurs its effect shall be to create, transfer, or extinguish particular rights. Occasionally, but rarely, a right is created or extinguished by separate decree of the sovereign, but these cases are too exceptional to warrant further discussion. The preceding brief analysis of the right at rest and in motion may be applied without alteration to the corresponding duty. It is, indeed, generally immaterial whether the examination of the relations governed by law be conducted from the point of view of the right granted or the duty imposed. Convenience dictates that sometimes one and sometimes the other should be emphasized. Law, however, is most characteristically conceived as granting rights rather than as imposing duties, and the right rather than the duty is, therefore, taken as the starting point in our present discussion.

In the four following chapters a more detailed examination of each of the constituent elements of a right will be attempted.

### § 3. THE CLASSIFICATION OF RIGHTS.

Various classifications of rights in general are in use. These are based upon differences in the character of the persons of inherence or the persons of incidence, differences in the nature of the demands made by their holders, differences in the origin of the rights, or differences in their mode of enforcement.

The following classifications, which are the best known, will be explained here :—

1. Public and Private Rights.
2. Rights *in rem* and Rights *in personam*.
3. Real and Personal Rights.
4. Personal and Proprietary Rights.
5. Antecedent and Remedial Rights.
6. Positive and Negative Rights.
7. Perfect and Imperfect Rights.

### 1. *Public and Private Rights.*

The term “public rights” is used in a variety of senses. It is sometimes used to denote those rights which are enjoyed by all persons as such, merely as a consequence of the facts of natural personality and membership of society. Rights to personal security, to personal freedom, to reputation, and the like, are thus termed “public” because they are held by all members of the public. For the same reason rights of passage over state, communal, or private property available for all members of the community are called public rights. The right to sail on the river Nile and the right to walk in Gezireh Gardens are in this sense public because they are conceded to all persons without distinction.

In a different sense the appellation “public” is sometimes given to those rights which concern the government and administration of the country. We often speak of public offices and public officials, meaning offices and officers under Government, and, for a similar reason, such a right as that to vote in the election of representatives on public bodies may be termed public. It is, however, more correct to speak of rights such as these are “political” rather than as “public,” since they are not enjoyed by all members of the community, but by definite classes only.

But the term “public” is most frequently used to describe rights held by the state as contrasted with the private rights

held by individuals. State rights are public because the state holds them as representing the community or public. This distinction is derived from that existing between public and private law already explained (*n*).

In all these somewhat differing significations the word "public" denotes that which belongs to or concerns the people as a whole in contrast to that which concerns individuals only. The word itself is derived from *publicus*, a Latin word connected with the word *populus*, which in that language signified the people.

2. *Rights in rem and Rights in personam.*

3. *Real and Personal Rights.*

The distinction between a right *in rem* and one *in personam* is based upon a difference in the character of the person against whom the right is available (person of incidence). A right *in personam* is available only against a determinate person or persons. The right of a servant to his wages, or of a vendor to the price of the goods which he has sold, is available only against the master or the purchaser, and such rights are therefore *in personam*. A right *in rem*, on the other hand, is available against any person as against whom it is the interest of the holder to assert it. It is, therefore, often said to be of "indeterminate" incidence. A man cannot require a stranger to the contract to perform the contract, for his right under the contract is available only against the other contracting party, but he can require everybody to respect the right to enjoyment of an object of which he is owner, or to abstain from personal violence such as would infringe his right to personal security, for such rights are available not against determinate persons, but against all the world. Yet the incidence of even rights *in rem* may be limited. If, for example, an owner of a house leases it, he thereby limits

(*n*) See Holland, Chap. IX., pp. 124-5.

his own enjoyment by giving the lessee certain rights which interfere with it. And rights *in rem* may also be limited in their incidence in virtue of a general rule of law such, for example, as that which gives a person who is assaulted a right to strike back in self-defence. But in all these cases the right is available whenever no special exception exists. The limitation is in such cases the exception, while in the case of rights *in personam* the limitation arises from the nature of the right.

French lawyers sometimes use in this connection the terms *droit absolu* and *droit relatif*. The use of the words *absolu* and *relatif* is misleading, because it suggests that only rights of the last-named class correspond to duties, and language is, indeed, sometimes used which conveys the impression that this is really the case. But rights *in rem* have duties corresponding to them no less than rights *in personam*, though the corresponding duties are in their case imposed upon an indeterminate number of persons (o). Some English writers use the terms "real" and "personal" instead of *in rem* and *in personam* (p). This terminology is, however, objectionable, since the term "real" is better understood in a more restricted signification to be shortly explained, and the term "personal" has other and more usual meanings.

Rights *in personam* generally arise from contract or from wrongdoing. The contracting parties are bound to one another through the contract by mutual rights and duties. But the contract only binds the parties and only gives rights to the parties. The rights, as also the duties, are, therefore, *in personam*. So, also, a person who infringes another's right by wrongdoing becomes bound to pay damages or to

(o) See Capitant, pp. 87, 88, for a definition of the French terms in exact conformity with the use of the terms *in rem* and *in personam* by English jurists.

(p) Salmond, pp. 205 ff.

offer some other form of reparation. The right to reparation is "*in personam*" because it is available only against the wrongdoer himself.

To avoid confusion it may, however, be useful to remark that a right *in personam* may frequently become available against some other person than the person against whom it was available at its inception. Thus, if Ahmed owes Zaky money the debt will not perish at Ahmed's death, but will thenceforth become available against his heirs. The heirs are said to represent the deceased. And a similar result is sometimes though less frequently produced between living people, whereby a creditor obtains a new debtor either in substitution for or in addition to the old one. But this fact does not affect the accuracy of the distinction under discussion. The right is still only available against determinate persons, though a new person or persons may have been substituted for those originally liable.

Rights *in rem* are of very various kinds (g). Thus every one has a right against the world to physical safety and freedom, and also a right to mental freedom, undisturbed by threats and immune from fraud. Again, we have a right to our good name, and a right to be allowed to follow our profession or occupation without interference. So, further, we have rights to use public highways and public gardens. In some cases, indeed, our only remedy for infringement of such rights may be by prosecution of the offender in the criminal courts, for the Criminal Law is busy in securing the enjoyment of rights *in rem*. But generally civil proceedings are also possible.

The most characteristic right *in rem* is, however, the right of property or ownership. Ownership is a right *in rem*, as also are many other rights enjoyed with respect to things. But in this connection a special phrase is often used, and we speak of property rights as "real," contrasting them with



rights *in personam*, which are termed for this purpose "personal" (r).

*Real and Personal Rights.*—All rights are available against persons only, but some are enjoyed with respect to a determinate thing. When rights thus enjoyed are available against the world at large (*i.e.*, *in rem*) the relation between the holder of the right and the persons subject to the correlative duties occupies a much less prominent place in thought than his visible association with the thing itself. The consequence of this is that such a right as the right of ownership of a house, for example, is often carelessly described as a relation existing between the owner of the house and the house itself rather than as one existing between the owner and others with reference to the house. Of course, no relation which falls within the class of rights can really exist between a person and a thing. Yet, although such a mode of speech is obviously inaccurate, it is quite reasonable that the right should be more closely associated with the thing of which it secures the enjoyment than with the indefinite group against whom it is available. Such rights are consequently termed real (*Lat. res*, a thing). A "real" right is therefore a right *in rem* enjoyed with reference to a thing.

When, on the other hand, the right is one available against determinate persons it is the association of the person of inherence with the person of incidence which is most prominent in thought. If Ahmed lends Zaky a hundred pounds his right to recover the money is available against Zaky alone, and it is this personal relation of the two men which strikes us at once as its dominant characteristic. Such rights are therefore described as "personal" when contrasted with "real" rights which relate directly to a thing.

(r) Rights of property as I use the term are to be distinguished as forming only a class of "proprietary" rights, as explained under the next heading. The term is ambiguous, and is frequently used in a broader sense. See Salmond, pp. 391-2.

The distinction is expressed by French writers by the use of the similar terms *droits réels* and *droits personnels* or *droits de créance*.

The term "personal" right in this sense means therefore a right *in personam*, but though the term right *in personam* is used when we are contrasting such rights with rights *in rem*, it is the custom to use instead the term "personal" right when we contrast it with the special class of rights *in rem* known as "real."

Whether a right is *réel* or *personal* is of importance when we come to determine the results which each has. Real rights being "*in rem*" are available against every one. This is easily understood with reference to the typical real right, that of ownership, but in the case of real rights less than ownership the application is not so easy. One peculiarity of the real right is stated by French writers to be the *droit de suite*, *i.e.*, the right to follow the thing over which the right is enjoyed into the hands of any one to whom it has passed. If, for example, Ahmed owes Zaky £E1000, and to secure the debt has granted to Zaky a hypothec over his land, Zaky, as hypothecary creditor, has a real right over the land which entitles him to have the land sold in order to obtain repayment of the money, even though the land may at the time of the sale no longer be Ahmed's property, he having sold it to another. Using figurative language we may say that the rights of the hypothecary creditor "run with the land." If Zaky had no hypothec he could still obtain a judgment for the repayment of his debt against Ahmed, and in pursuance thereof could have the land sold. But he could do this only if the land was still Ahmed's property. Had Ahmed sold the land before the judgment, Zaky's rights in respect of it would have thereby come to an end. For the right to obtain payment from Ahmed is only a right *in personam* and does not "run with the land."

So, again, if I make an agreement with the owner of a

garden under which I am entitled to walk in the garden at certain hours, I acquire under the contract a right to enter the garden which I can enforce against the owner, but not against any other person, *e.g.*, a purchaser from the owner. Even a lease of the garden whereby I obtain a right to the exclusive possession during the period fixed by the lease does not give me a real right, but only a right *in personam* against the lessor. Such, at least, is the view taken of the lessee's rights in French law. This was also the Roman Law. However, in modern French law (F. C. C., art. 1743) a lessee who has registered his lease and thus given to it a "*date certaine*" cannot be ejected by a purchaser from the lessor nor by the lessor's creditors acting under an execution (F. C. C. Pr., art. 684). Nevertheless, even this is not interpreted as giving to the lessee a real right. The purchaser is regarded as merely "standing in the shoes" of the original lessor. Upon purchasing the property he took upon himself, it is said, all the lessor's obligations with regard to the lease, and is consequently only in the position of a new debtor substituted for the old one (s).

The use of the term "real" now under discussion has other applications. Thus a "real" action as opposed to a "personal" action is one in which the plaintiff seeks to recover a particular thing in contrast with one by which he seeks to obtain some other form of satisfaction from the defendant for the wrong done. If Ahmed seeks to recover from Zaky some specific object of which he alleges that he is owner his action is real in character, but if what he seeks from Zaky is merely the payment of money the action is personal, since it is not the delivery of any specific thing which is in issue.

(s) For a discussion of the nature of the lessee's right, see Planiol, II., §§ 1707 ff. In English law an action for recovery of possession was early given to the lessee, and the *real* nature of his right cannot be doubted (see Holdsworth, "History of English Law," II., pp. 492-3; III., pp. 180 ff.).

#### 4. *Proprietary and Personal Rights.*

Proprietary rights are those which have money value or, in other words, form part of a man's economic wealth. The class includes such diverse rights as the right of ownership of land, the copyright of a book, rights to repayment of money lent, or to pecuniary damages for injury done, rights to alimony, and rights of succession to property. All these rights have a money value. The sum total of them is sometimes described as forming a man's estate or "*patrimoine*." They are grouped together, therefore, by French writers under the head of "*droits patrimoniaux*" (t).

Proprietary rights are of two kinds. They fall under the head either of Property or of Obligation. The term "property" as here used is intended to include all the real rights just discussed, while "obligation" comprises all personal rights of a proprietary character.

An obligation is a legal tie existing between determinate persons whereby the one (the obligor, *créancier*) is entitled to some act or forbearance on the part of the other (the obligee, *débiteur*) (u).

Thus the word always connotes the idea of a tying or binding together of the persons concerned, being indeed derived from a Latin word, *ligare*, which means to tie or bind. The bond by which the obligee is bound to the obligor is a legal one. Its untying (Lat. *solutio*) can only be accomplished by the happening of some fact which loosens the bond, the most common of such facts being the per-

(t) For "estate" and "*patrimoine*" see further below, p. 408.

(u) Just. Inst., III., 13, pr. Ihering ("Der Zweck im Recht," Chap. VII., § 6) says that a *creditor* in Roman Law was originally a person who gave something to another with the obligation of its subsequent return. The words "*créancier*" and "*débiteur*" are used in French in a somewhat broader sense than are the corresponding English words "creditor" and "debtor." These latter always imply that the debt owing has a money value immediately ascertainable.

formance of the duty for the fulfilment of which the obligation was created.

The obligation necessarily consists of a right held by the one person available against the other, upon whom is imposed a correlative duty. Whenever this relation of legal right and duty exists between determinate persons there is an obligation between them. If Zaky owes Ahmed one hundred pounds we say that Zaky is under an obligation to pay Ahmed the money. In this case the relation is proprietary. When Ahmed's right is not proprietary the relation existing between the person of inherence and the person of incidence is not usually regarded as falling within the sphere of obligations. Thus marriage creates a legal relation of right and duty between the husband and wife, the husband, for example, being entitled to the society of the wife. Such a right on the part of the husband is not, however, proprietary, and consequently it is better not to describe it as a legal obligation.

Rights of this last-mentioned kind are termed personal. The class of personal as opposed to proprietary rights includes all rights which are not valuable in the economic sense. Of these two the principal classes are the rights which arise from the family relations (*droits de famille*) and those vested in persons in right of their citizenship (*droits publics, droits politiques*).

The student must note that the distinction now under discussion has nothing in common with that already discussed between rights *in rem* and rights *in personam*. Some proprietary rights are *in rem*, e.g., the right of ownership, others are *in personam*, e.g., the right to recover money lent. Most personal rights, indeed, are *in rem*, e.g., the right to personal freedom, but an example of a personal right *in personam* may be found in that of the husband to his wife's society, while, on the other hand, the right of the husband as against others to enjoy the society of his wife, of which

the breach may constitute adultery, is a right *in rem*. It follows, also, that the term "personal" when opposed to "proprietary" has a different signification to that which it has when opposed to "real." The right which is "personal" not "real" may yet be proprietary.

Remark further that a right is only proprietary if it actually has a money value. It may often happen that the breach of a non-proprietary right gives rise to a right to claim money damages by way of compensation. Our social life is so penetrated by the idea of property that we find the grant of a right to obtain property a very natural method of compensating a person even for injuries to his honour (*e.g.*, by defamation). But the right infringed need not itself be proprietary. My good name is not property, though the community will soothe the annoyance I feel at an attack upon it by giving me property. The insulted person might feel better satisfied if the community allowed him to spit at the defamer, but this, it is thought, would be contrary to good order (*x*).

### 5. *Antecedent and Remedial Rights.*

This division of rights does not appear to be generally employed, but it is valuable as throwing further light on the character of a right. Some rights are enjoyed for their own sake, others are conferred in order to remedy a breach of pre-existing right. If my right *in rem* to freedom of person is violated I have a new right given me, a right *in personam*, against the person who has injured me. This new right is "remedial" in its character, and as compared with it we may say that the right originally violated was

(*x*) Bentham suggested that the insulted person should obtain redress not by the grant of a proprietary right, but by some form of symbolic satisfaction. Thus an insult to a woman would be redressed by dressing up the offender as a woman and allowing women publicly to insult him.

“antecedent” or “primary.” Remedial rights are conferred because of a breach of right. They are therefore “sanctioning” rights, *i.e.*, they serve to sanction the rule of law under which the antecedent right was given. Remedial rights are given either for breach of a right *in rem*, as in the example above, or for a breach of a right *in personam*, as when a right to sue is given to sanction a breach of contract (*y*).

### 6. *Positive and Negative Rights.*

A positive right is one which consists in a claim that the person of incidence shall do some act, *e.g.*, pay money or render services. A negative right is one by which a forbearance only is claimed. Thus the right of ownership is negative because the persons of incidence, against whom the right is available, are not bound to do some act, but merely to refrain from interfering with the owner’s enjoyment of his own property.

In this connection may be noted an ambiguous use of the term “right.” In European political life the phrase “a right to work” is often heard in the mouths of Socialists or adherents of “Labour” parties. By this the speakers generally mean, not that every man has a legal right to work in the sense that others are bound to abstain from interfering with his freedom to choose and exercise his vocation (a negative right), but that the state is bound to provide work for all (which would, if admitted, be a positive right).

### 7. *Perfect and Imperfect Rights.*

The perfect right is one which is not only recognized but is also enforced by the state. Imperfect rights are recognized but not enforced by the state. Legal rights are

(*y*) As to antecedent and remedial rights, see further Holland, Chap. IX., pp. 144-5.

normally perfect. Imperfect rights are exceptional. An example of such a right is furnished by a right to recover money the action upon which has been barred by lapse of time. The Courts decline to entertain claims for payment of a debt after a certain period since the debt accrued due has elapsed. But if the creditor is able to obtain payment without recourse to the Courts the law admits such payment to have been recovered in pursuance of a legal right. Thus the law recognizes the existence of the right though it declines to enforce it (z). In the Civil law the term "natural" obligation is used to designate a tie of this kind, formed by the existence of an "imperfect" right.

Moral rights which are not recognized by the law at all must not be spoken of as imperfect rights. They are not legal rights at all. Thus the right to receive gratitude for favours granted, not being recognized by the law, is neither perfect nor imperfect. It is not a right at all in the legal sense.

(z) For other examples see Salmond, p. 201. See the case reported in *Gaz. Trib.*, X., No. 256, for the distinction between an "imperfect" right (or "natural" obligation) and mere liberality.



## CHAPTER IX.

### PERSONS AND THEIR STATUS.

#### § 1. LEGAL CONCEPTION OF PERSONALITY.

SINCE the law exists for the regulation of human conduct, legal rights and duties can belong only to human beings. Primarily the conception of a person in law must therefore be that of a person in nature.

The law, however, is concerned only with persons as holders of rights and subjects of duties. A human being who did not enter into the field of legal rights and duties would, in the eyes of the law, be not a person but an event. If such a natural person, in spite of his personality, be treated as a domestic animal and regarded as the property of another, he becomes in law the object, not the subject, of rights, a thing and not a person. This is the position of a slave. In Roman law the slave was the object of ownership; he could not himself own property. In strict theory he was placed on a level with the beasts that perish; he could be bought and sold, flogged, tortured, and even killed by his master, subject only, in the later laws, to such humane regulations made in the interests of public morality as prohibited excessive brutality—provisions resembling those which exist in all civilized countries to-day for the prevention of cruelty to animals. Might, not right, was the basis of the relation between the owner and the slave, as it is to-day between a donkey-boy and his donkey, and the free exercise of this might is secured by law against the interference of third persons. Such limitations as exist are the result not

of the creation of legal duties towards the animals, but of duties towards the community and the state as representing it. The *arbaghi* who flogs his horse unduly is, or ought to be, punished, not because the horse has a right not to be whipped beyond measure, but because the state requires decent conduct on the part of its citizens (a).

As a matter of fact the natural personality of the slave was, even in Roman law, allowed some legal results (b). The fact of personality was too evident for legal theory to be able to ignore it entirely, and this has been so, to a greater or less degree, in all slave-holding countries. In the same way in mediæval Europe a person who "professed religion," that is, became a monk or a nun, underwent what was termed "civil death," and from that time forward was deemed to be dead in law and consequently lost his personality. His heir obtained the succession, his will took effect, and he himself was henceforth incapable of acquiring property. Yet a fiction so contrary to fact could not be maintained in all its logical results, and it had to be recognised that, though dead, the monk could at least do wrong and suffer injury, which a corpse cannot (c).

These examples show that though the natural person is normally the subject of legal rights and duties, yet it is conceivable that he may be excluded from the sphere of law, in which case personality in law is denied to him. On the

(a) Early law did sometimes, by a confusion of thought, treat animals or even inanimate objects as in a sense legally responsible for breaches of the law. Indeed, in the Middle Ages beasts appear to have been formally prosecuted, defended, tried and sentenced. Until the middle of the last century the instrument with which a homicide had been committed was in England forfeit as "deodand" (given to God). As to these curious survivals, see Pollock and Maitland, "History of English Law," Vol. II., pp. 471 ff.; Holmes, "The Common Law," Chap. I.; Gray, *op. cit.*, §§ 100 ff.

(b) See Melville, "Manual of Roman Law," p. 105.

(c) Esmein, "Histoire du Droit français," p. 619; Pollock and Maitland, "History of English Law," I., pp. 416-421.

other hand, we find that the scope of legal personality has been enlarged beyond the class of natural persons, so that groups of persons or even things have been, for certain purposes, treated as the subjects of legal rights and duties, although the group of persons is certainly not itself a person in the ordinary natural sense, and the thing is a mere inanimate object.

The discussion of the character and incidents of this "juristic personality" will be taken up in the next chapter. Our present concern is with natural persons alone.

## § 2. COMMENCEMENT AND EXTINCTION OF PERSONALITY.

Personality in law normally commences at birth. Prior to birth the child is not capable of acquiring rights and duties. Yet the law usually recognizes a sort of potentiality of right in the child conceived but not yet born. Thus, by art. 906 of the French Civil Code, a child in the womb may be the recipient of a gift *inter vivos* or by will, subject, however, to the condition that it be afterwards born alive (*d*).

In slave-owning countries the emancipation of the slave fixed the moment of birth of the personality in law just as reduction into slavery by extinguishing the capacity for rights and duties operated like death to destroy personality. Normally, of course, the extinction of personality takes place by natural death. Even here, however, the legal life of the deceased is sometimes fictitiously extended beyond the moment of natural dissolution. Thus in Roman law a vacant inheritance was sometimes said to carry on the person of the deceased (*e*).

It is frequently important both for the individual and

(*d*) Cf. Dig., 1-5-7, and B. G. B., art. 1932.

(*e*) "*Hereditas enim non heredis personam sed defuncti sustinet*"; Dig., 2-1-34.

for the state to have an authentic record of the date of his birth, and similar records as to death or burial are of equal value. And, besides supplying information in particular cases, the collection of records of this description forms the basis of the vital statistics of a nation, by means of which many interesting and valuable facts with reference to its life can be ascertained. Led by considerations such as these, modern states have universally created registers of births and deaths (*f*), the relatives or friends being legally bound to report the occurrence to the authorities by whom the entry in the register is made. In France and England the need for such registers was long met by the ecclesiastical registers of baptisms and burials, but France secularized her system of registration at the time of the Revolution (*g*), and England established a national system of registration by the Births and Deaths Registration Act, 1836 (6 & 7 Will. IV., c. 86). In Egypt registration of births and deaths was regulated by Decrees of 9th June, 1891, and 12th March, 1898, and Law No. 23 of 1912.

### § 3. STATUS AND NATIONALITY.

The word "status" is one of peculiar difficulty on account of the different shades of meaning which are attributed to it.

The dominant idea which it expresses is, however, that of personal condition. Sir Henry Maine contrasted "status" with "contract" when he said that the progress of society had been from status to contract (*h*). By this he meant that while in early society a man's relations with his fellow men, both economical and legal, were determined for him as a consequence of the position he occupied in society, in later times he has been left free to regulate such relations as he

(*f*) As also registers of marriages.

(*g*) F. C. C., arts. 34 ff.

(*h*) "Ancient Law," Chap. V. For the famous dictum, see p. 170.

pleases (i). The most striking example of the determination of a man's economic position by his status or personal position is afforded by the Hindu caste system. The influence of the same idea is manifest in the fixing of social ranks. In law a good example is afforded by the position of a son under power in early Roman law. The legal rights and duties of the son under power were fixed for him by his status of "son." Roman legal history shows us how little by little, though never completely, the son was emancipated from the restrictions of his status and enabled to enter into relations with other people without reference to it; that is to say, his legal relations came more and more to be regulated rather by contract than by status.

The Roman example serves as an introduction to the Roman conception of status from which all modern ideas are derived. Status, according to the Romans, was the sum total of a person's rights and duties, capacities and incapacities, so far as these resulted not from facts peculiar to himself, but from membership of a class. For this purpose the jurists classified persons under three heads, according to their degree of liberty (*status libertatis*), their

(i) "Maine's now celebrated dictum as to the movement from Status to Contract in progressive societies is perhaps to be understood as limited to the law of Property, taking that term in its widest sense as inclusive of whatever has a value measurable in exchange. With that limitation the statement is certainly just and has not ceased to be significant" (Sir F. Pollock in Notes on "Ancient Law"). I refrain from comment upon the relation of this doctrine to the modern so-called socialistic movement as a result of which the right of free contract as regards certain matters is withdrawn by legislative enactment and fixed and unalterable obligations imposed in substitution (cf. the Workmen's Compensation Act). The scope of contract in early communities has been very variously defined. M. Tarde argues forcibly that it has been under-estimated and that the law of contract was well developed as regards the internal relations of the community, though almost absent from its external relations (*Les Transformations du Droit*, Chap. V.). But this question is more relevant to the history of the Law of Contract.

possession or lack of the rights of citizenship (*status civitatis*), and their position in the family (*status familie*).

The classification corresponded, indeed, to the organization of Roman society. This organization was founded upon the family. Family relation was of dominant importance in determining legal position. The *paterfamilias* possessed far-reaching rights over the person and acquisitions of those subjected to the *patria potestas*, and conversely, the *filius familias* was subjected to disabilities as a result of his position. Above the family rose the state (*civitas*). Roman citizenship had important legal results both in giving the right to be governed by the "*jus civile*," and in conferring public rights and privileges. Outside the Roman "*civitas*" stood the *peregrinus* (alien), governed not by the *jus civile* but by the *jus gentium*. The existence of slavery made it necessary to draw a further distinction between those who were free, whether citizens or aliens, and those who as slaves were deprived of all legal personality.

A person's position in the eyes of the law varied, therefore, according to the class to which he belonged. His legal status was the result of such membership, and, as a consequence, each class came to be treated as a separate status. The special rights, duties, and disabilities attached to each class are consequently spoken of as arising from status. Thus we speak of (say) the status of a son, meaning by this strictly the special rights and duties arising from sonship, but often more laxly thinking of the sonship as the status from which the special rights and duties arise.

Change of status was spoken of as *capitis diminutio*. The "*caput*" (lit. head) consisted of the various rights which belonged to the man as freeman, citizen, and member of a family, and any loss of such rights was a "lessening, impairing of the *caput*." It does not seem that every *capitis diminutio* was to the disadvantage of the person who suffered it. It was a change of status rather than a reduction of status. But

certain of such changes were clearly to his disadvantage, for example, the loss of citizenship consequent upon the loss of freedom (*capitis diminutio maxima*) (k).

The Roman law of status was based on a social organization which no longer exists. Slavery has disappeared in all civilized countries, and the modern application of law on a territorial basis has reduced the importance of the law of nationality. The characteristic institution of *patria potestas* which produced most of the peculiarities of the Roman family status is, moreover, not present, except in a very modified form, in modern European systems, and this fact much diminishes the influence of family position in determining legal rights and capacity. The idea of status has consequently somewhat changed its character, though it still retains in its modern uses the impress of its Roman origin.

It ought, however, at once to be remarked that in the East personal condition has far greater influence upon a man's legal position than in the West. Religion was not in Roman times regarded as giving rise to a legal status because the application of law was not affected by religious considerations. In the East, however, its importance from this point of view has always been strong, and in India and Egypt we find, as has already been remarked, that for certain purposes it still regulates the application of law. Men are classified as Christians, Hindus, Mohammedans, or Parsis for the purpose of determining what law is applicable to them and, therefore, what their rights and duties are. The law which depends for its application upon religious status is called the "personal statute" because it is this peculiarity in personal condition which determines its application. Again, although nationality has ceased to affect to a considerable degree a man's legal position in European countries, yet in Egypt, as a consequence of the

(k) Melville, "Manual of Roman Law," Part II., Chap. II.

Capitulations, its influence is still dominant. The status of "Englishman" or "Frenchman" is therefore of much greater importance in that country than it is in England or France (1).

To-day, therefore, the three factors which determine a person's status are family relationship, religion, and nationality, and of these religion has but little influence except in the East, and family relationship far less importance than it had in earlier times. Nationality, therefore, is the most important factor, though even the influence of a difference of nationality upon legal condition varies much in different countries.

Nationality (in the legal sense) consists in membership of a state. Such membership gives rise to certain rights and duties given or imposed by the law of the state only to or upon persons who are members of it. The rights given by nationality are principally of a political character, *e.g.*, the right to vote for representatives of the national assembly, and the duties also are mainly concerned with the defence of the state, *e.g.*, the duty to serve in the army. Apart from rights and duties of this description the fact that a person is a native or a foreigner in a country has little influence upon his legal position, though the violent excitement of national feeling incidental to war has had as a result a distrust of foreigners, particularly of our late enemies, which finds expression in recent legislation, particularly as regards immigration. Thus, before the war a man could wander about Europe unchallenged, while now movement is impeded at every step by the necessity of obtaining permits and

(1) A "status" is a condition. The Personal "Statute" is a body of law. The origin of the latter term has been already explained, and it is a pure accident that the terms should so closely resemble one another in form. There is a Real Statute as well as a Personal Statute, as we have already seen. Remark, however, that the application of the Personal Statute is in Egypt principally determined by the national or religious status of the parties.



*visas*, of producing passports and paying the consequent fees. Such things we may hope will pass, and in spite of them the statement remains true that the fact that a person is a foreigner has little influence upon his civil rights and duties.

Its importance, however, varies. In Egypt, as in any other countries in which foreigners have privileges derived from Capitulations, it is obviously far more important than in the normal country in which all persons alike are justiceable by the local courts. So, again, in very many countries, *e.g.*, France, Italy, Germany, Switzerland, and Egypt, the national law of the party is applied to determine his capacity to acquire rights and duties, and in general to regulate the family relationships and the distribution of his property upon death (*m*). In such countries the fact that a person is a foreigner does make a difference as to the law which is applied to govern his transactions (*n*). On the other hand, in England and America, as also in the Scandinavian countries, the fact that a person is a foreigner does not affect the law applied to him in these matters. The view adopted by the law of these countries is that a man's personal condition should be regulated by the law of that community in which in fact he lives, whether in law he is a member (or national) thereof or not. Thus, English law will be applied to determine the capacity of a Frenchman if the Frenchman is domiciled (*o*), *i.e.*, permanently resident in England, and so

(*m*) M. C. C., art. 190; F. C. C., art. 3; Introductory Law of the German Civil Code, art. 7; Swiss Federal Code, Titre Final, art. 59; Italian Civil Code, art. 6.

(*n*) The application of the foreign law is, however, sometimes carefully limited by statute (cf. German Introductory Law, art. 7; Swiss Federal Code, Titre Final, art. 59) and sometimes by the jurisprudence (cf. D. 61-1-193, *Affaire Lizardi*).

(*o*) Domicile in English law denotes the country of permanent residence, *i.e.*, the country in which a person resides with the intention of permanently residing there. The French word "*domicile*" is freely used to mean the place where a person lives, his home. Temporary

also French law will be applied by the English Courts in the contrary case in which an Englishman has taken up his residence permanently in France (*p*).

Nationality is a legal conception. It depends upon the law of the state, and consequently a person may be held by the law of two or more different states to have two or more different nationalities. Of course, there is sufficient similarity between the laws of most states to make this unfortunate result somewhat rare, for most people are born in the country of which their parents are natives, and no question then arises. But suppose, for example, a child is born in England of French parents. Such a child is, according to English law, a natural-born British subject, and yet, according to French law, he is not a British subject at all, but a French citizen. So, again, suppose an Ottoman subject goes to France, and after long residence there obtains a grant of French citizenship (naturalization). According to French law he is thenceforth of French nationality. But the Ottoman law might apparently treat this naturalization as void and regard him as still an Ottoman subject (*q*). It is difficult to escape from these conflicts, and in speaking of the nationality of a person we should always bear in mind that our conclusion may be that arrived at only by the law of the particular country to which we are referring.

In Egypt questions of disputed nationality are very frequent. Jurisdiction depends there upon nationality, and

residence at a place does not make it a domicile (cf. *Gaz. Trib.*, VII., No. 403). The French Civil Code (art. 102) speaks of a person as being domiciled "*au lieu où il a son principal établissement.*"

(*p*) The rule is so laid down, but the range of its application is doubtful. Cf. *Male v. Roberts*, 6 R. R. 823; *Guépratt v. Young*, 87 R. R. 355; *Chetti v. Chetti*, 78 L. J. (P.) 23; and particularly the remarks of Lord Gorell in *Ogden v. Ogden*, 77 L. J. (P.) 34.

(*q*) Ottoman Law of Nationality, 1869, art. 4. This provision has given rise to several interesting Egyptian decisions. See *Gaz. Trib.*, II., p. 162; III., No. 111 (*Affaire Azar*), 183, 427.

it is consequently necessary often to decide as a preliminary question what nationality the parties possess, or, more correctly, whether they or one of them is of foreign or native nationality. The Mixed Courts now themselves decide these questions when raised before them (r), formerly they were treated as matters to be arranged between the diplomatic representatives of the states concerned.

To sum up, status or personal condition is in modern law resolvable into three elements, family condition, nationality, and (in the East) religious communion. From this point of view we may say that birth, marriage, and death are the three dominant events which determine status. Naturalization as a member of another state, or (in the East) conversion to another faith, also affect status. Proof of status will then depend upon proof of these facts. Documents proving birth, marriage, and death are consequently termed by the French *actes de l'état civil*. The word *état* (status) (s) is here used of position in the family or the state. The *actes de l'état civil* are the entries in the registers of birth, marriage, or death which show what a person's status is (t).

However carefully one may seek to limit the meaning of status for legal purposes, it is nevertheless often impossible to avoid the use of the term in a popular sense and to describe

(r) Arminjon, "Etrangers dans l'Empire Ottoman," pp. 139 ff.; B. L. J., XV., 115; XX., 259; Gaz. Trib., III., No. 428.

(s) The word "estate" in English is, of course, the same word as the French "*état*." Indeed, in older French *état* was written with an "s," and it was in that form that it came over to England with the Normans. Both are derived from the Latin "*status*." It is, however, curious that the English word "estate" has come to be used of property rather than of personal rights, so that a person's "estate" may even be directly contrasted with his "status" (cf. Salmond, pp. 212-214). In the older sense of personal condition the term is still retained in such phrases as the "Estates of the Realm."

(t) See Gaz. Trib., IX., 146, to the effect that the question as to whether death has occurred or not is a question of the personal statute and not within the competence of the Mixed Courts.

as occupying a status almost any class of persons possessing peculiar rights. Thus people speak of the "status" of a policeman as giving certain special rights and imposing special duties, and so also of many other similar classes of persons. This broad use of the term introduces confusion if permitted in legal language and should be avoided. The idea is more aptly expressed by saying that certain special rights are incident to the office of policeman. And when speaking of the special rights of such a class as (say) land-owners it is better not to say that the rights constitute a special "landowning" status, but to speak of them merely as the proper constituents of the ownership of land. The importance of limiting the idea of status is due principally to its effect upon the arrangement of the law. It is this which has given rise to most discussions upon the meaning of the term. The Romans distinguished the *jus quod ad personas pertinet* (law relating to persons) from the *jus quod ad res pertinet* (law relating to things). The former was practically equivalent to the law of status, but since, in fact, the most important part of the Private Law of status was concerned with family position, in practice that part of the law was almost equivalent to Family Law. Austin, who wished to extend the notion of status to include all varieties of official duties, abandoned as a consequence the Roman division of law into Public and Private, at least, as a primary classification, and placed Public law under the law relating to persons because it was the law of official status (*u*). Dr. Holland, who, as we shall see, identifies status with capacity, treats the law of persons as the law of abnormal persons only, so that the law of family no longer finds a place within it.

Status, therefore, according to the conception of the term here recommended includes all varieties of legal position which are due to national, religious, or family condition. We may group together as composing the status all the

(*u*) Austin, Lect. XLIV.

special rights and duties attached to the person by reason of such position. Under the head of *National* status will be placed—

(a) Rules determining the conditions under which nationality is acquired or lost.

(b) Privileges of jurisdiction enjoyed by foreigners as the result of the Capitulations.

(c) Special rights and duties possessed by or imposed upon citizens as such.

Under the head of *Religious* status will be placed the rules determining the choice of the personal statute and of the Courts by which it is administered.

Under the head of *Family* status will be placed—

(a) The rules determining the condition under which family position is acquired or lost (marriage, legitimacy, adoption, divorce).

(b) The special rights and duties arising from family position, such as the mutual rights of husband and wife, father and son, etc.

Some of these are personal (rights to society, between husband and wife, to custody, to guardianship), others are proprietary (rights to alimony, to succession). In practice the Law of Succession is usually separated from the Family law because its connection with family rights in European countries is somewhat remote now that a large testamentary power is usually accorded. In Mohammedan countries the connection is closer owing to the restricted nature of the testamentary power.

#### § 4. CAPACITY.

Capacity and status are often confused. "A person is capable of a given right," says Austin, "if on the happening of a given fact the law would invest the person with that given right" (*w*). Less precisely it is said that a person who

possesses a right or is subject to a duty is capable, *i.e.*, has capacity, if he can exercise his rights or fulfil his obligations himself (*x*), *i.e.*, without the intervention of any other person such as a guardian or curator.

Now, in Roman Law capacity to hold or exercise rights or to come under duties depended mainly upon a person's position in the family, upon citizenship, or upon his free or unfree character. Capacity and incapacity were, therefore, consequences of status. This is still in part true. Family position as such does not now seriously affect a person's capacity, though even here the status of married woman has in many countries decided importance in this respect. And though to a less degree than in Rome, the status of foreigner does even now to some extent affect capacity. Nevertheless, the most important incapacities known to modern law arise from circumstances which do not create a status in the sense in which we have just learnt to use this term. This makes it desirable to distinguish capacity and status, though we may recognize at the same time that the one is not infrequently dependent upon the other. Starting, therefore, with Austin's definition of capacity we may classify persons in law from this point of view as normal or abnormal.

The normal person is capable of acquiring any right recognized by the law, and a great part of the law consists of statements as to the facts which will invest him with the various rights so recognized. But, as regards certain classes of persons, the facts which in normal cases would suffice to give rise to a right do not, in their case, have that effect. They are thus incapable of acquiring the right, or their capacity to acquire is restricted. Thus in some countries it is forbidden to a foreigner to acquire land. In such a case the facts which would serve as title to the land in the case of a native do not have that effect in the case of a foreigner. He lies under an incapacity.

Capacity, however, consists not only in ability to acquire rights, but also in power to exercise them. A minor, for example, though he is not under incapacity to acquire rights of (say) ownership in land, is generally incapable of exercising certain of the rights which form the ordinary contents of the right of ownership. The normal owner can, for example, sell his land if he pleases. But a sale made by a minor is in most legal systems not effective to transfer the land, at least, unless some special formalities are observed. In such a case the capacity to exercise the rights normally attaching to ownership is restricted and the minor may be said to be under an incapacity or disability in this respect.

Again, under art. 25 of the Native Penal Code the convict, that is, the person who is convicted of a crime, cannot during his confinement in prison sell or otherwise deal with his property except by way of will or by constituting a waqf. Moreover, all his contracts are void, and he is also subjected to disabilities as to holding public offices, etc., even after his sentence has expired. All persons thus subject to incapacity are "abnormal," that is, their situation either as regards the acquisition, the enjoyment or the exercise or fulfilment of rights and duties varies from that of the ordinary person (*y*). Such abnormalities arise sometimes from natural facts, such as a youth, sex, mental or even physical defect, and at other times from the policy of the law which denies the enjoyment of certain rights to aliens, enemies, religious dissenters, and so on, or which considers it undesirable that full power of enjoyment or exercise of rights should be conceded to persons who have shown themselves unworthy (prodigals, convicts), or the peculiarities of whose constitution make restriction

(*y*) Dr. Holland (Chap. X., pp. 140-1) treats all varieties of Capacity as varieties of Status. This use of the term is usual in English, but is at variance with French practice, and cannot be commended to Egyptian students. The term "abnormal" which he uses to denote persons subject to an incapacity may, however, be adopted.

necessary (juristic persons). Thus incapacities are sometimes natural, sometimes penal, and sometimes imposed in deference to general social interests. Their character and scope will vary from age to age and from country to country, though such of them as are based on natural deficiency of intellect must remain permanent. ,

Often the incapacity consists only in a denial to the person of the enjoyment of a right, *e.g.*, the incapacity of an alien to own land, but when it concerns the exercise of rights it is frequently necessary to arrange some method by which the rights of the incapable person shall be exercised or less duties fulfilled during the period of incapacity. This is the motive for the institution of guardianship (*tutelle*) in the case of minors and the appointment of committees (*curateurs*) for the care of the person and property of lunatics.

Capacity in Egypt is made to follow nationality ; that is, a person is deemed capable to the extent to which his national law treats him as capable.



## CHAPTER X.

### JURISTIC PERSONS.

#### § 1. THE NATURE OF JURISTIC PERSONALITY.

PERSONALITY in law is usually but the recognition of personality in nature, for the natural personality of a human being is, in all but rare cases, recognized as giving personality in law. Yet, as we have seen, a natural person may be regarded by the law not as a person but as a thing, the object, not the subject, of rights. Nor need we be surprised to find the contrary to be also true and personality in law attributed where natural personality does not exist. The commonest examples of such an extension of the idea of personality are furnished by its attribution to a group of persons who, as a group, are looked upon by the law as one person instead of as a body of separate individuals. Indeed this usage by the law does not conflict with popular language. If a number of people form an association for some joint purpose, whether business or pleasure, we speak of the group by some common name and attribute to it virtues and vices as though it possessed a personality of its own. Thus we speak of the British Chamber of Commerce, the University of Oxford, the Cairo Bourse, and so on. But this popular usage does not blind us to the fact that the personality of the group is merely the result of the personality of the members of the group, and the virtues and vices attributed to the group, are virtues and vices possessed by some considerable number of its members. Again, these associations of persons are intended often to continue long after all the persons who

form the group have passed away, and from this point of view also, the association has to be looked upon as in some sort independent of its members. The University of Oxford has lasted a thousand years. Generation after generation has passed away, but the University remains. Obviously, therefore, in speaking of the University something more is expressed than the mere fact of the association of certain persons. The persons change, but this does not affect the existence of the University. Continuity of purpose and continuity of organization give an appearance of permanence to the University throughout the centuries and invest it in men's eyes with a kind of independent life of its own.

Now the law has made use of this popular conception, and it also conceives of the group as possessing a life distinct from that of its members. It makes "the group person" the subject of rights and duties, the owner of property, and so on, distinct from the rights and duties and the property of the persons who form the group. It recognizes the group life as distinct from the life of the members of the group.

The idea of "group personality" has a long history in European law. It was first formed by the great Roman jurists and in later Roman law was fully comprehended. The Romans spoke of the group or collective person as a *universitas personarum* (a) and contrasted the rights and duties of the *universitas* itself with those of the *singuli* or individuals who were members of it. Another term used by them in this connection was *corpus* or body. The members of the group taken together were said to form a *corpus*, from which term comes the modern word "corporation," employed to signify the same idea.

In the Middle Ages there existed many groups or asso-

(a) Hence the English word "University" and the French word "*Université*," which have become restricted in meaning to the higher educational institutions of the country.

ciations of men acting together for certain purposes as one body. Such, for example, were the trade guilds and the boroughs, both of which were centres of an energetic group life. The "corporate" character of these groups was early recognized. Rights and privileges were claimed and maintained in the name of the collective whole and a clear distinction drawn between the interests of the individual guildsmen and burghers and those of the guild or the borough itself (b).

Following out the Roman conception, it was inevitable that, when it became necessary to give precision to the legal standing of these and other forms of group life, personality should be directly attributed to them. They were spoken of as *personae fictae* (fictitious persons), for although the law might choose to classify the collective body or "corporation" as a person, yet the personality did not really exist, except in a figurative sense. To mark this "legal" character of the personality of corporations they are spoken of in English as "artificial" or "juristic" persons (c).

Free use was made of this idea of the corporate personality of the group in connection both with municipal and ecclesiastical affairs. The group as an abstract idea has, as already pointed out, a permanence not possessed by the separate members. To erect the group into a legal person was thus to create a person not subjected to human mortality and specially suitable to be the owner of property devoted to public and charitable purposes and to protect interests of an enduring character. In more modern times a new use has been found for the conception in providing for the needs of commercial enterprise. In the seventeenth and eighteenth centuries great commercial companies were already in existence to which a corporate personality had been given. Such, for example, were the British East India Company.

(b) See Carr, "Principles of the Law of Corporation," Chap. IX.

(c) In French they are spoken of as "*personnes juridiques*" or "*personnes morales*."

and the Bank of England. It was not, however, till the nineteenth century that general regulations were made for the incorporation of associations of persons engaged in business enterprise. To what groups of this character juristic personality is now accorded will be explained below. At the present day corporations of this class form the vast majority of the juristic persons in existence.

It is necessary to note with some care what the separate legal personality of the group really involves in law. In the first place the creation of a group person distinct from the members of the group effects complete separation between the legal rights and duties of the individual and those of the group. Property held by the group belongs not to the members but to the new group person or corporation created by the law. Thus in strict legal theory the property of (say) the Standard Life Assurance Company is owned not by the shareholders in the company, that is, the members of the group, nor even by all the shareholders taken together, but by a totally distinct person in law, namely, by the company itself. The company has a *patrimoine* distinct from that of the members. It is not only as regards property but as regards other rights and duties also that this separation between the group and the individual interests is made. A juristic person acquires rights and incurs obligations, and its debts are not owing to the members but to itself, nor can its credits be claimed except by itself (*d*). This involves the conclusion that the

(*d*) The theory was pushed to a logical extreme in England in the case of *Salomon v. Salomon*, [1897] 66 L. J. (Ch.) 35, the "one man company" case. It was there held by the House of Lords that a company, consisting of a trader, his wife, and sons, incorporated under the English Company Acts could borrow money from the trader himself on the security of the business on such terms that when the company became insolvent the trader could step in and take over the whole business assets in virtue of his security, leaving the creditors of the company unprovided for.

corporation can sue and be sued in its own name, and can sue and be sued by any of its members. It can lend money to any of its members and be liable to them for money received, and its property alone can be liable for its debts. These cannot be recovered from the members separately, since it is not they but the corporation which is the debtor. In actual practice, indeed, it would often be unjust to carry out the principle to all its logical conclusions, in the case of business companies at least. For although, for convenience' sake, the company is regarded as a person distinct from the members, yet the responsibility for the actions of the company belongs to the natural persons engaged in the enterprise. Consequently these persons are by law bound to contribute out of their property to the payment of the company's debts, their liability in this respect being sometimes unlimited and sometimes limited in character.

And it is not only in respect to financial responsibility that the law finds it impossible to hold strictly to the view that the juristic person has a personality quite distinct from that of the members of the group. In truth, the juristic person is only a property owning unit and a unit capable of suing and being sued, but if we go further and try to treat the group person as a real person, and having, in consequence, all the incidents of personality we press the fiction too far. Even the English Courts which have often in strong language insisted upon the separate personality of the juristic person did not show themselves prepared to push this artificial conception to its logical conclusion by ignoring entirely the nationality of the members and directors of an English company. The question arose with reference to a trading company incorporated in England but of which the shareholders were nearly all Germans and whose directors were Germans and resident in Germany. The House of Lords laid down in its decision that the friendly or enemy character of a company could not be decided merely with reference to

its country of incorporation but that the national character and residence of the shareholders and directors must also be taken into account (*e*).

Although, therefore, juristic personality is not solely and legal conception but is based upon a group unity recognized by popular speech, the recognition of the personality of the group in law is not, as in the case of natural persons, merely the legal recognition of a natural fact, but a new creation, the creation of a person in law where none exists in nature. And the fiction of personality should not be pressed beyond the limits of the purposes for which the creation is effected. The practical purposes served by the conception of juristic personality are as follows :—

(1) If there are a large number of persons having common interests, *e.g.*, owning property, there is obviously grave practical difficulty in dealing with them, and the difficulty is the greater because our ideas of property are moulded upon individual property. The law reduces group interests to the convenient and well-known form of individual interests by regarding the group as a person (*f*).

(*e*) *Daimler Co. v. Continental Tyre Co., Ltd.*, 83 L. J. (K. B.) 1333. The Mixed Courts, however, have held that a company of which the shareholders are enemies but which had its seat in Egypt had not enemy character (Gaz. Trib., VI., No. 172), but if a partnership is in a form unknown to Egyptian Law its nationality follows that of its members (Gaz. Trib., V., No. 238).

(*f*) In England the notion of juristic personality independent of the personality of the individual took such a hold upon the legal imagination that it was applied not only to groups but to a series of men holding a particular office. While the personified group was spoken of as a “corporation aggregate,” the personified series was spoken of as a “corporation sole,” seeing that at any one time there was but one sole natural person of the series in existence. In this way the office of the King is personified under the name of the “Crown,” whereby a separation is effected between the natural person who at any moment fills the office of king and the abstract notion of kingship. This separation between a person and his office is often made in popular speech, as has already been remarked, but the English use of the popular

(2) Group interests are permanent, and no better method can be suggested of giving expression and effect to their enduring character than by attributing them not to the changing body of members, but to the group itself, that is, to a legal personification of the group.

Unity and permanence are thus secured by the attribution of juristic personality (g).

But besides these, we obtain thereby a separation between the rights and duties of the natural persons who form the group acquired or incurred for individual purposes and those which have been acquired or incurred as members of the group in furtherance of group purposes. This separation is necessary in order that the group interests may be more effectively secured, and it can be best accomplished by attributing the group rights to a separate group person (h).

The group of persons acting together for some common purpose undoubtedly forms the most natural basis for the attribution of juristic personality and in many systems of law it is indeed the only basis known. But as is more fully explained in the following note it is by no means the only basis conceivable. It is the existence of a continuous purpose rather than the mechanical replenishment of the group which really forms the unifying element in an institution, and the Roman and German systems of law, at least, fully recognize this. An institution, that is to say, exists as such in virtue

idea to form the basis of a juristic person is, it is believed, unique. Nor is it in England fully developed.

(g) Salmond, pp. 294, 295.

(h) Mohammedan law does not seem to have developed a theory of juristic personality. Certain of the needs which led to the creation of the juristic person in Europe are, however, met by the Mohammedan institution of waqf. Indeed French writers speak of the waqf as a juristic person, but the waqf bears a much closer resemblance to the English "trust," and in Anglo-Mohammedan law it is treated as a form of trust (see below, pp. 397 ff.; and as to the similarity of function of the conception of juristic personality and of the trust, see Salmond, p. 296).

of its purpose rather than in virtue of a continuous series of members.

Again, it must not be supposed that every group has as such juristic personality. Far from it. How juristic personality is acquired will be explained below. But unincorporated groups are very common. A football club, for example, has a continuing purpose and a continuous series of members. Physically there consequently exists a basis for the conferment of juristic personality. But it is very improbable that juristic personality will actually be possessed by such a group. The group has consequently no unity in law although it may have unity in spirit and in function. The extent to which the personality of groups will be recognized by the law will depend largely in each country upon the willingness of the state to encourage association among its members for common purposes. But the mere fact that persons are associated for a common purpose does not of itself make them into a juristic person.

The character and the utility of the attribution of personality to the group as above explained have been much discussed of recent years in England, France, and Germany. Two tendencies of thought have manifested themselves. On the one hand a determined attack has been made upon the alleged fictitiousness of the personality given to the group, while, at the opposite extreme, other writers have emphasized this fictitiousness for the purpose of exhibiting its uselessness.

The classical theory in France and in England regards the juristic person as only a person by fiction or pretence of the law. Though for convenience sake the law chooses to pretend that the group has a personality distinct from its members and thus creates a new person in law, such personality has not existence in nature. The existence of the juristic person as a person is, therefore, entirely dependent upon the fiat of the law. The personality did not exist until the law created it and must, of course, cease to exist so soon as the law chooses to withdraw its recognition.

This view is not only the one which seems to accord best with the modern law of corporations in France and England, but it is the only one which fully explains certain uses of the idea of juristic personality to which reference is made below. It ignores, however, some



important aspects of the life of the corporation and has, in consequence, been severely criticized by a modern school of legal writers. These writers contend that the group personality is not a fiction but a reality. It has been already seen that in attributing personality to a group of people organized for some common purpose the law is but adopting and giving legal form to a popular conception. The people regard the group as a unity and as having a life independent of that of its members before the law steps in to recognize such group personality. This in itself seems to indicate that the personality is not merely the creation of the law, but exists and would exist independently of legal recognition. However, popular attribution of a sort of personality to the group may after all be just as artificial as its attribution by the law. The supporters of the "Real theory" of juristic personality need to go further. They contend that the group possesses the prime element of personality, namely, an independent will. The association of many persons produces a will distinguishable from that of the separate members of the group. The will of a meeting, the will of a mob, each has a character of its own. The group will is the product of the association. It results from mutual personal influence and common purpose, from compromise and submission (*i*). This corporate will inspires the action taken by the group person in the world, just as the individual will of a man inspires the man's own action. Thus we find here the same basis of reality of personality in the corporation as in the individual. The individual is such by reason of his individual consciousness and individual will. And in the group also there is a group consciousness and a group will. The group has, then, a real personality of its own, which the law may recognize but does not create.

This view has been brought into prominence in Germany by Dr. Gierke. It has gained a considerable measure of support, for it undoubtedly proclaims a truth in emphasizing the real character of the group life. It will be found sympathetically expounded by the late Professor Maitland in his introduction to the translation of a portion of Dr. Gierke's book (*k*).

The objections to the theory as fully explaining the nature of juristic personality are based chiefly upon the wide extension of such personality beyond the bounds of any real exercise of the corporate

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(*i*) Freund, "The Legal Nature of Corporations" (Chicago, 1897), p. 52.

(*k*) "Political Theories of the Middle Ages," being a translation of part of Gierke's "Das Genossenschaftsrecht." See also Dr. Jethro Brown in L. Q. R. (1905), pp. 365-379.

will and upon the somewhat artificial character of the whole conception.

There can be no doubt that in some cases at least juristic personality is purely fictitious. We may claim that a group working together evolves a personality of its own, but the attribution of personality is not, in many systems of law, limited to groups. It is extended to things. Thus German law permits a fund of money devoted to a particular object to be incorporated as a person (*m*). The Roman Law recognized what were called "*universitates bonorum*" as distinguished from "*universitates personarum*." The "*universitates bonorum*" were aggregates of property to which juristic personality was attributed. Inheritances upon which no heir had entered, and, in later times, churches, hospitals, and almshouses, were regarded as persons in law.

Indeed there does not appear to be any good reason why the law should always demand a "*corpus*" or basis upon which to erect its juristic personality, whether that basis consist of a person or group of persons or a thing or an aggregate of things. The purpose of the law in attributing juristic personality is to procure the differentiation of the rights and duties acquired for the furtherance of a special end from those held for the general purposes of the individual. And this object can often be accomplished merely by attributing personality symbolically to the institution as such.

In England, indeed, the juristic person is always a corporation in the strict sense, that is to say, it is always erected on the basis of a defined group whose corporate unity creates the new personality. But the necessity for such a defined group of persons as the basis of the legal attribution of personality does not seem to be so clearly recognized in France, at least as regards branches of the public service, such as universities and hospitals, to which personality in law is freely accorded.

It remains to mention another criticism of the current doctrine of juristic personality of a very different character. A considerable body of writers object that the attribution of juristic personality in any case is itself unnecessary and misleading. It is unnecessary because

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(*m*) B. G. B., art. 80. In this connection the student may read the 6th lesson in M. Saleilles, "*De la personnalité juridique*," where the nature of the French "*fondations*" and of the German "*Stiftung*" are examined. One may remark that in English and in Mohammedan law the need for attribution of juristic personality to funds affected for special purposes is removed by the existence of the doctrine of Trusts in the one and that of Waqf in the other.

all the objects aimed at by the use of that device can be secured by means of the idea of "collective" ownership. It is misleading because, in reality, the rights and duties attributed to the juristic person are the rights and duties of individual persons, and the invention of a third party, the juristic person, who is made the holder of these rights, only serves to conceal the true facts. "Suppose a group of ten members. They are ten in number, not eleven. Gierke would say that there are eleven natural persons, the ten members and the group person. The older fiction theory would also see eleven persons, but one of them fictitious. But really there are only ten. But these ten can hold property separately as individuals, jointly in undivided parts, or collectively as a group. And if they own property as a group the law applies to the group the same rules which it would apply if the property were held by a single person. Thus juristic personality is only a way of explaining the application of the rules of law to a particular case. There is no need to invent a new person, distinct from that of the group" (n).

Undoubtedly the idea of collective or group ownership may be used to explain many of the peculiarities of the law of juristic personality, and to a very considerable extent the two conceptions serve the same purpose. But there seems to be no reason why we should abandon the older explanation. For, in the first place, the newer view ignores the reality of the abstract idea of the group upon which emphasis was placed at the beginning of this section. The group may not be a person in the ordinary sense of the word. But even though the legal personality is the creation of the law, yet the group exists as an idea distinct from its members. The personality is fictitious, but the group is not. And the attribution of juristic personality only emphasizes this important fact. The distinction between ownership of separate shares and the so-called "collective ownership" can only be clearly put by saying that property owned collectively is owned by the group as a group; the rights and duties involved have to be attributed to the group as distinguished from the members of the group. But this is in effect the language of personification, and it is only by such language that we can properly express the separateness of the group interests which is the essential feature of the conception.

Moreover, however completely collective ownership might serve as

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(n) Berthélemy, "Droit Administratif," p. 31. The subject is fully dealt with in M. Saleilles' lectures "*De la personnalité juridique*," to which the student is referred for a discussion of the ancient and modern theories. See also an article on "Legal Personality," by Prof. Geldart in L. Q. R., 1911, pp. 89 ff.

an explanation of what may be termed the passive side of group life, it entirely fails to explain group activity (o). Some formula is necessary which will exhibit the group not only as holding rights but as exercising them. It is for this purpose that the aptness of the idea of personality becomes most obvious. No conception could more adequately express the unity of the group in all its varied dealings with men, as the owner of property, as a party to an agreement, or as the doer of a wrong. The personification of the group makes such group action easy to comprehend and has the further advantage of satisfying the conditions of legal liability.

## § 2. CLASSIFICATION OF JURISTIC PERSONS.

French writers classify juristic persons according to their public or private character (*personnes morales du droit public, du droit privé*).

Juristic persons of a public character are those which form departments or branches of the public service. They represent, therefore, forms of government action.

On the other hand the juristic persons whose character is private owe their establishment to private initiative although their purpose may be one of general benefit to the community.

At the head of Public Juristic Persons stands the state, which is the personification of the whole nation for the purpose of the attribution to it of those powers and interests which concern the community as a whole.

This personification is common in modern law, but it is an idea by no means easy of apprehension. The separation in thought of the interests of the society as a whole from those of the private individual, or of some minor group to which he belongs, requires a power of abstraction by no means universal. Yet it is this separation which forms the basis of public spirit.

(o) See particularly the article of M. Jossierand, "Sur la Propriété collective," in "Livre du Centenaire," II., pp. 357 ff.

The difficulties which men have felt in viewing the community as itself the possessor of distinct interests are illustrated by the frequent attribution of interests really those of the community to some one person as head and representative thereof. Kings have been the rallying points of communities in the past and are still so to a considerable extent to-day. Loyalty to a king is easier to men than devotion to the interests of an abstract state.

In England the earlier and more natural idea has left its trace on the law. In that country it is not the state, but the king, in whom all public rights are conceived to be vested and to whom all public duties are owing. The personification of the office of king is made there to serve the purpose fulfilled in France by the personification of the state. Thus Englishmen speak of the Royal Forces, of the King's Navy, of the Crown lands. The term "the Crown" is indeed specially used to denote the king in his corporate capacity (*p*). There can be little doubt that to make public duty centre in a time-honoured institution and a venerated person immensely strengthens its hold on the average man (*q*).

Beneath the state exist large numbers of subordinate administrative persons created for the performance of special public functions. Thus, in France, each department and

(*p*) Thus when King Edward VII. gave to the nation Osborne House, in the Isle of Wight, which belonged to him in a private capacity, an Act of Parliament (2 Edw. VII., c. 37) was passed by the effect of which the Osborne Estate "became vested in His Majesty in right of the Crown" and ceased to be part of the private estates of the sovereign.

(*q*) In Egypt the usage in these matters is diverse. The corporate embodiment of the people is usually described as the Egyptian State or Government. But justice is administered in the name of the Sultan as representing the community. In England all public prosecutions are brought in the name of the King. In Egypt the State Representative is put forward as the "public" prosecutor. In America it is the "Commonwealth" which prosecutes.

commune is a juristic person whose affairs are managed by local officials or elected councils. In England, the larger towns are in the same way created corporations, but the method more favoured in England is to incorporate not the administrative unit itself, but the governing body only. Thus the County Councils, which manage county affairs, and the Urban Councils, which manage the affairs of the smaller towns, are incorporated as juristic persons.

Whichever method be adopted, the object of the incorporation is to create a person to represent the common and permanent interests of the whole body of inhabitants in the locality.

Juristic persons of this class are termed by French writers "*personnes administratives*." From them are distinguished the "*établissements publics*," which are institutions forming branches of the public service but separated from the administration and constituted separate persons with an independent existence and consequently separate property. In this class are to be ranked such public institutions as the French Academies, the Universities, Government and Communal Hospitals, Chambers of Commerce, and the like. In England such institutions as these would be considered public in no other sense than that they serve public interests. For in England the Universities, for example, are not, as in France, branches of the public service.

Turning now to juristic persons of a private nature (*du droit privé*), it must be particularly noted that many of these have public interests in view. They fall, nevertheless, within the scope of private rather than of public law, because they are not organs of the government but owe their origin to private enterprise. In France such persons are classified under three heads, as being either (a) *établissements d'utilité publique*, (b) *associations déclarées*, or (c) *sociétés*.

The distinction between the first two classes can only be properly understood upon a consideration of the law of

juristic personality in France as affected by the Law of Associations of 1st July, 1901, as to which something further will be said in the next section. They comprise institutions and societies formed for the mutual advantage of their members or for charitable or educational objects as distinguished from those which have in view pecuniary gain (*un but lucratif*). Thus, under this head may be ranked clubs, provident and mutual benefit societies, private educational institutions, private hospitals, and the like. Trade unions (*syndicats professionnels*) possess juristic personality in virtue of the law of 21st March, 1884, by which their constitution is fixed.

*Sociétés*, as distinguished from *associations*, are groups of persons who agree to co-operate with a view to some pecuniary gain divisible among the members of the group. The class thus includes all business enterprises carried on by two or more persons jointly. It does not, of course, follow that all such groups are endowed with juristic personality. Only under certain conditions is such personality conferred upon the group. Sometimes the number of persons co-operating in the enterprise is small, but sometimes it is very large. The small group forms in England what is known as a partnership, while the large group tends to adopt the form of association described as a company (*r*). The French word "*société*" covers, however, both these classes. In English law juristic personality is denied to partnerships, but French law does not draw any distinction of this sort between the different kinds of *sociétés*. The French classification of *sociétés* is based upon differences in the object for which they are formed, *sociétés commerciales* being distinguished from *sociétés civiles*. The former class includes all partnerships and companies which engage in,

(*r*) Business associations of more than twenty persons must in England be registered as companies under the Companies Acts. See now Companies (Consolidation) Act (8 Edw. VII., c. 69), s. 1.

acts of commerce. Among the most characteristic of such acts may be noted the purchase of products for resale, the manufacture of articles, carriage of goods, banking transactions, affreightment, and insurance.

"*Sociétés commerciales*" are regulated by special provisions contained in the Commercial Code and are subjected to the jurisdiction of the Commercial Courts. Those *sociétés* which are not engaged in commerce are regulated by the Civil Code only and form the class of "*sociétés civiles*." The distinction is, therefore, of a very artificial character. Indeed this artificiality has led to the institution of a class of "*sociétés civiles*" which, taking the form of a "*société commerciale*," become thereby subjected to the jurisdiction of the Commercial Courts and to many of the regulations of the Commercial Code (s).

There can be no question as to the juristic personality of this special class of "*sociétés civiles à forme commerciale*." But as regards other *sociétés civiles* the existence of personality has been strenuously denied. Recent jurisprudence, however, has recognized them as persons (t), and this view is now generally accepted.

The law recognizes three forms of *sociétés commerciales* as possessing juristic personality. These are known respectively as (a) *sociétés en nom collectif* (partnerships under a collective name), (b) *sociétés en commandite* (commandite partnerships), and (c) *sociétés anonymes* (limited liability companies). The difference between the first and second of these kinds of *sociétés* is that in the case of partnerships under a collective name all the members are personally responsible for the debts of the partnership, while in that of commandite partnerships some of the partners merely make a fixed contribution to the capital of the partnership

(s) Loi 1<sup>er</sup> avril, 1893.

(t) Thaller, "Traité élémentaire de Droit Commercial," §§ 295-298.



and are only liable for the partnership debts to the extent of this contribution (*u*).

The partnership under a collective name is the natural type of arrangement between two or three persons who agree to carry on a business in common when all of them take an active part in its management. The commandite partnership is but a development of the same species. It is used in cases in which the managing partners have not sufficient capital to enable them to carry on the business effectively and obtain the assistance of some wealthier person, who risks in the enterprise just so much as he contributes to the partnership funds (*v*). In each case the number of the partners is likely to be small and the necessity of endowing the group with juristic personality is not so great as in the case of larger combinations of persons. The principal advantage gained by such endowment is the capacity to sue and be sued in the partnership name. But it will be observed that, in the case of these *sociétés*, there is no such complete separation of the property and liabilities of the *société* itself from those of its members as is characteristic of most kinds of juristic persons. As already pointed out, partnerships of this kind are not in English law regarded as possessing juristic personality at all (*x*).

Limited liability companies stand, however, in another category. In order to appreciate the practical needs which

(*u*) M. Com. C., arts. 25, 28, 29, 33; N. Com. C., arts. 19, 20, 22, 23, 27.

(*v*) The principle of the Commandite Partnership has been introduced into England, but juristic personality is not conferred upon the group. See Limited Partnership Act, 1907 (7 Edw. VII., c. 24).

(*x*) True as it is that partnerships are not juristic persons in English law, this does not apparently cause any substantial differences between the French and English law of partnership. For while, on the one hand, the members of a French partnership are jointly and severally liable for the whole of the liabilities of the firm, the English partnership is, on the other hand, recognized as having sufficient unity to enable it to be sued in the firm name.

have given rise to the introduction and extended use of this form of business association in modern times, it is necessary to take into consideration the course of commercial history during the past century. This period has witnessed an unprecedented increase in the quantity of capital available for business enterprises and in the variety of the opportunities for development and exploitation of the world's resources. Many of these enterprises required an aggregate capital far beyond the means of any small group of persons, and this led to the formation of large combinations of capitalists, each of whom contributed perhaps but a small part of the whole fund required. Such combinations were known as Companies. Obviously it was impossible for all the members of these groups to share in the direction of the business, the more so since many of them would not be conversant with the proper methods for its conduct or would lack the requisite expert knowledge. The direction was therefore necessarily confided to a few persons, generally themselves members of the group. The other contributors relied upon their general right of control exercised through examination of the accounts and the reports of the directors. As these companies grew in number special regulations became necessary. The ordinary partnership is formed between persons known to one another personally, but this element of personal contact was lacking in these combinations of capitalists whose connection with one another was limited to common contributions to the company's funds. This gave a permanent character to the combination which is lacking in a partnership, and this permanency was effectively secured by the institution of limited liability on the part of the contributors. The limitation of liability was effected by the provision that the contribution made or promised by each member should fix the maximum of the amount which he could be called upon to pay for the purposes of the enterprise. Such an arrangement facilitates

also a change of membership being brought about through the transfer to others of the interest or share which a contributor has in the concern.

Resulting from this process of development we have a group person possessing to the full the characteristics of juristic personality, and in modern law such personality is freely accorded. The company as a person is easily separable from its individual members. It exists independently of changes in membership which may be brought about by sale of shares or their transfer on death. Its funds consist of the moneys contributed by members with a reserve composed of any amounts promised but not paid up. These funds are the capital of the company and are employed solely for company purposes. They alone are available for company liabilities. The capital is generally divided into shares (*actions*), the property of the members, numbered and registered against the names of the proprietors in the company's books. The profits of the enterprise are divided proportionately to the holdings of the shares. It is, of course, necessary for the company to have a name, which in Egypt (*y*) must be that of the object of the enterprise. Its domicile and nationality are regulated by law. In every respect, therefore, the company seems to comply with the requirements of juristic personality. The separation of *patrimoines*, which we have seen forms so important an element in such personality, is present in their case in a very complete degree, for the limitation of liability, which is very generally allowed, makes such separation much more marked than in the case of the ordinary partnership.

The French classification of juristic persons has been presented at some length in order that it may serve as a basis for the discussion of juristic personality in Egypt. It

(y) M. Com. C., art. 39 ; N. Com. C., art. 33 ; and see the following articles in each Code for the regulations applying to limited companies in Egypt.

ought, however, to be noted that in the Native Courts questions of juristic personality are less frequently raised, owing to the fact that the Mixed Courts have claimed and secured jurisdiction in all cases in which a "mixed interest" occurs. Such an interest is held to be present whenever a juristic person of whom any individual member is a foreigner chances to be a party to the suit.

Under present circumstances in Egypt this theory of the mixed interest removes from the jurisdiction of the Native Courts all the more important commercial associations. Partnerships between natives are, of course, purely native in character, and these, therefore, are not within mixed jurisdiction; but in the case of companies the presence of some foreign interest is almost universal. Indeed it may be doubted whether any company exists with purely Egyptian membership, and in most cases the bulk of the members are foreigners. As a consequence of this, Company Law in Egypt is, in practice, entirely mixed.

*Egyptian Juristic Persons (z).*—The state in Egypt is admittedly a juristic person and may be sued before both the Native and Mixed Courts.

The class of *personnes administratives* is represented, certainly by the Municipality of Alexandria (a), and much more doubtfully by the six Mixed Commissions of Mansourah, Medinet el Fayoum, Zagazig, Tanta, Damanhour, and Beni-Suef (b). Juristic personality has been expressly conferred upon the new Provincial Councils by art. 11 of the Law of 13th September, 1909, by which they were created. The Mudiriehs do not constitute juristic persons as do the

(z) See more fully an article by M. Pélissié du Rausas in "L'Egypte Contemp.," 1918, pp. 155 ff.

(a) Decree 5th January, 1890, art. 13.

(b) The subject is discussed in Lamba, "Droit Public et Administratif de l'Egypte," pp. 264, 265. M. Lamba argues forcibly that the Commissions do not enjoy juristic personality. But see O. B., X., No. 69; XI., No. 123; XIII., No. 37.

French Departments. The Government Administrations seem to have juristic personality, since they are treated in practice and in law as liable to be sued in their own persons (c).

These, however, appear to be the only Public juristic persons known to Egyptian law. The centralized character of Egyptian administration has up to the present made difficult the relative independence which would be enjoyed by such public institutions as were endowed with separate personality.

As regards Private juristic persons the Egyptian law is in a rudimentary state. Following French law, juristic personality is accorded to commercial partnerships and companies, though only in the case of these latter is express provision made as to nationality. The question as to the personality of "*sociétés civiles*" does not appear to have been raised before the Native Courts, but the Mixed Courts have decided that they must be regarded as juristic persons (d).

As regards associations and institutions formed for other purposes than those of pecuniary gain the position is more doubtful. No law similar to the French Law of Associations of 1901 exists in Egypt, nor is provision made for recognizing institutions as of public utility so as to confer upon them juristic personality (e). In fact, however, the Mixed Courts do recognize certain associations as possessing juristic personality, basing their recognition upon the existence of a "group" property separate from that of the members of the association itself (f). This jurisprudence must commend

(c) N. C. C. Pro., art. 8 ; M. C. C. Pro., art. 10. "

(d) B. L. J., IV., 30 ; V., 85

(e) This method of conferring juristic personality by "*déclaration d'utilité publique*" is explained below, p. 329. For the wholly different "Declaration of public utility" preparatory to expropriation see Lamba, *op. cit.*, p. 485.

(f) See the decision in the case of the *Association des Missions*

itself as éminently reasonable. In such cases all the marks of juristic personality (except that of express state recognition) exist, and it is strictly in accordance with a sound legal policy to extend to Egypt the principles of law upon the subject generally recognized in Europe.

In the Native Courts the jurisprudence appears to be conflicting. The Tribunal of Assiout has held that the only private associations which can be considered to have juristic personality are those which have for their object to make a profit out of the common funds (*g*). On the other hand there is a decision of the Tribunal of Cairo in which the personality of the Mohammedan Benevolent Society was recognized, it being remarked in the judgment that "seeing that the documents in the case proved that the Government had recognized the existence of the society as a juristic person, though such acknowledgment had not been express but only tacit, it must be considered to exist as a person and to have the right to do all things not contrary to the Common Law, and consequently it possessed the right to sue" (*h*).

A few words may be added with reference to the extra-territorial recognition of the corporate existence of juristic persons. This recognition is in conformity with the principles of Private International law; in according it the Court of one country are but giving effect to rights and capacities created by the law of another country. But the recognition both of the existence and of the powers of a foreign corporation is generally subjected to conditions and restrictions directed mainly to prevent the abuse of the privilege by its being employed to evade the terms of the local law. Thus

*Africaines*, 11th May, 1909 (discussed in an article in "L'Egypte Contemporaine," 1910, pp. 287 ff.). See also *Ahmed Tewfik v. Ahmed Bakry*, Gaz. Trib., I., p. 159; II., p. 193.

(*g*) O. B., IV., No. 7.

(*h*) Cf. also O. B., XV., No. 13.

as a general rule the capacity of a corporation to enter into any legal transaction will be governed not only by the law of its own constitution, but concurrently by the law of the country where the transaction occurs (i).

There has recently arisen in Egypt an interesting body of jurisprudence upon this question as to the recognition of foreign corporations, and in particular of foreign companies. The questions at issue are too technical for discussion here. It will suffice to say that the Mixed Courts have adopted the view that the real existence of a company is to be determined not by the law of the country in which it was incorporated, but by that of the country in which its interests were really centred. Thus they have declared non-existent in Egypt companies which, though formed in England and registered there under the English Company Acts, yet were essentially Egyptian Companies in the sense that their business was in Egypt and they had there the administrative centre (*siège social*) of their affairs (j). Such companies in order to be recognized in Egypt must comply with the terms of the Commercial Code. They can only exist in virtue of a decree (N. C. Com., art. 47).

### § 3. THE CREATION AND EXTINCTION OF JURISTIC PERSONALITY.

In the case of natural persons the dates of natural birth and death are normally the dates of commencement and loss of personality. These conditions obviously do not apply to juristic persons. In their case a more artificial rule is necessary.

Three methods for the creation of such persons may be noted—

#### (1) Common Law and Custom.

(i) Dicey, "Conflict of Laws," art. 129.

(j) Cf. B. L. J., XX., 221 ; XXII., 257.

(2) State concession or specific recognition.

(3) Some general rule of law.

Of these three methods the two latter are the most important.

Common Law and Custom are merely intended to cover those cases in which some institution has been treated as a juristic person by a long-established usage to which it is difficult to assign any definite commencement. Thus the Crown in England is a corporation at Common Law, and the treatment of the state as a corporation in most countries must be referred to the same origin.

As regards a very large class of juristic persons their personality is the immediate result of specific state recognition.

In England corporations are generally created by Royal Charter, that is to say, by a special grant on the part of the king, by which a body of persons is constituted a juristic person. Such a grant is called a Charter of Incorporation. For example, such bodies as the Municipality of Hemel Hempstead, the University of Leeds, the Incorporated Law Society, and the like, possess charters from the king, by which they were made corporate bodies. Indeed so strong is the feeling that a corporation owes its existence to a charter, that in some cases in which a municipality or other body has in fact enjoyed the privileges of personality, although unable to produce any charter by which it was conferred, the Courts have "presumed" the existence of a lost charter in order to connect their creation with the prevalent theory (*k*).

In France a "*déclaration d'utilité publique*" serves the same purpose as is served by a charter in England. Such

(*k*) This is an example of a legal fiction. There are other examples of the use of the same fiction in English law (cf. "Laws of England," XL, §§ 517, 518). In Palestine, the constitution of the "Pro-Jerusalem Society" as a juristic person was effected by direct grant made by the High Commissioner.



a *déclaration* does not, indeed, expressly confer personality, but its effect is to enable the institution thus recognized as of public utility to act as a juristic person. These *déclarations* are effected by “*décrets rendus dans la forme des règlements d'administration publique*” (l).

Various circumstances have, however, demanded a more liberal grant of personality than would be feasible under a system of specific grant. In particular the growth of commercial partnerships and companies has brought into prominence a species of group life which bids fair to overshadow all others by its importance. In France this growth did not necessitate any addition to the methods of creation of juristic persons, since *sociétés commerciales* have always been treated as such whether they are merely petty partnerships or huge companies. For, from the moment of their constitution, such *sociétés* enjoy personality in virtue of the general rule of law which recognizes the personality of all groups of that class. This is true also of *sociétés* in Egypt, but in the case of one class, namely, *sociétés anonymes*, the Commercial Code provides that they can only exist in virtue of a firman of the Khedive authorizing the formation of the company (m). In England it was necessary to make special provision for commercial companies, since no general rule conferred personality upon commercial groups as such. A new method of securing personality was therefore created by the Companies Act, 1862, by which any group of not less than seven people wishing to carry on business in common may register themselves as a company at the proper office and thereby obtain for themselves incorporation (n). The methods adopted by the French Law of Associations of

(l) Planiol, I., § 3038. For “*décrets portant règlement d'administration publique*” see above.

(m) N. Com. C., art. 40; M. Com. C., art. 46.

(n) See now Companies (Consolidation) Act, 1908 (8 Edw. VII., c. 69), s. 2.

1st July<sup>1</sup> 1901, are similar. By that law an *association* desiring to obtain *capacité juridique* (a term involving here juristic personality) has only to make a declaration at the office of the Préfet, giving particulars as to its name, object, and so forth, and forthwith it will be treated as a juristic person (o). Comment has already been made upon the absence of any such law in Egypt. So far as *associations* have been regarded as juristic persons in that country, their recognition as such has been based on tacit acknowledgment by the state on principles of general equity. Finally, the existence of juristic personality is sometimes due to the specific provisions of statute. Thus in Egypt the grant of personality to the new Provincial Councils is contained in the law by which they are established (p).

The extinction of a juristic person may be the consequence of the withdrawal from it of the concession or recognition of its personality by the state. But in the case of private associations and companies the dissolution is often voluntary on the part of the members. The methods of dissolution and the rules regulating the ultimate distribution of the assets are, however, too special to claim treatment here (q).

#### § 4. CAPACITY OF JURISTIC PERSONS.

The position of juristic persons before the law is necessarily abnormal in character. They are not subject to human mortality. Nor can they be credited with the possession of a will or mind in the same real sense that this is true of natural persons. Moreover, they exist, as a rule, only for the accomplishment of some defined object. These three circumstances cause their capacity to own property and to

(o) Loi 1<sup>er</sup> juillet, 1901, arts. 5, 6.

(p) See above, p. 324.

(q) See briefly on this subject, Capitant, pp. 191-196.

perform acts which have legal effect to be different to that possessed by the normal person in law.

In the Middle Ages the peculiarities of their constitution had already produced certain modifications of their powers. The most important juristic persons at that period were ecclesiastical corporations, such as monastic houses, churches, and the like, which the piety of the age endowed with vast estates in land. The ownership of these estates by the Church was, however, injurious to the interests of the feudal lords because they lost thereby the valuable rights which came to them upon the deaths of their tenants. The corporation never died (*r*). At a later time it was seen to be contrary to public policy that land, which in every country is limited in quantity, should pass into the hands of persons not subject to the ordinary vicissitudes of human life, the practical effect being to withdraw the land from the ordinary market. For the corporation was far less likely than a natural person to have occasion to sell the land. These considerations have, in Europe, led to the imposition of restrictions upon the holding of land by juristic persons (*s*). Thus the French Law of Associations (1st July, 1901) forbids associations from owning more land than is strictly necessary for the object they have in view, and in England the alienation of land to a corporation is not permitted unless a licence from the Crown has been obtained or authority given by some statute (*t*). Alienation to a corporation is spoken of as alienation into "mortmain," a word derived from the French and meaning the "dead hand" (*u*).

(*r*) Esmein, "Hist. du Droit fr.," pp. 268-270.

(*s*) Esmein, *op. cit.*, 620-622. For the history of the subject in England, see briefly Carr, *op. cit.*, pp. 34-48.

(*t*) Statutum de Viris Religiosis (1279); 15 Ric. II. c. 5 (1391); Mortmain and Charitable Uses Act, 1888 (51 & 52 Vict. c. 42); and see "Laws of England," VIII., §§ 815 ff.

(*u*) Apparently because the property passed into the "dead hand" of the patron saint of the religious house (cf. Pollock and

A further limitation upon the capacity of a juristic person arises from the nature of its personality. Acts attributed to the juristic person must always be in fact accomplished by natural persons acting on its behalf. So far as one person can be bound or benefited by the acts of another no difficulty exists, for, to that extent, the natural person will bind or benefit the juristic person for which he is acting. Thus juristic persons can enter into agreements, acquire and transfer property, and even be held liable for wrongs in all cases in which one person can be held liable for the wrongful acts of others.

When, however, as often happens, liability for wrong arises only as a consequence of a wicked intention in the mind of the doer, there is an obvious difficulty in holding a juristic person responsible. A legal abstraction cannot have a wicked mind. In English law the question has been raised in connection with certain civil wrongs, such as malicious prosecution and libel. In these cases personal wicked intention is essential to liability, and it was, therefore, argued that juristic persons could not be held liable for them. But in spite of the apparent contradiction involved, the recent decisions in that country have admitted corporate responsibility for such wrongs (*x*). This result can only be attained by attributing to the corporation the wicked intention of those who actually directed its affairs in order to make the property of the corporation suffer the consequences of the evil acts which were done for its benefit.

It is, however, in connection with criminal wrongs that the question is perhaps of greatest interest. A twofold difficulty occurs in seeking to make a juristic person crimin-

Maitland, "History of English Law," I., p. 481). The word is used of waqf property in N. C. C., art. 7 (English translation). Compare the French expression "*biens de mainmorte*."

(*x*) *Abrath v. N. E. Rail. Co.* (1886), 55 L. J. (Q. B.) 457; *Cornford v. Carlton Bank, Ltd.*, [1900] 68 L. J. (Q. B.) 196; see Carr, *op. cit.*, pp. 72 ff.

ally liable. In the first place, personal wicked intention is generally considered an essential condition of such liability, and, in the second place, the ordinary methods of criminal punishment, and in particular the punishment of imprisonment, are obviously inapplicable to juristic persons. Certain other punishments, such as fine, confiscation, or dissolution, can, however, be inflicted upon such persons and, in fact, corporations were in the Middle Ages, both in France and England, punished in this way (*y*). Such cases of criminal responsibility were peculiar in character. Examples are furnished by the fining of towns or counties on account of some evil deed done within their boundaries. In effect this was a method of securing that the inhabitants of the town or district should see to it that all their fellow townsmen behaved themselves. If there was misbehaviour it was often simpler to make all the inhabitants corporately liable than to trouble to search out and punish the persons actually responsible (*z*). Fines were also inflicted upon towns and other corporate bodies or districts because of some neglect of a corporate duty. Thus, boroughs were fined for not repairing bridges and the like. \*

The tradition of the criminal responsibility of corporations has been continued in England, at least so far as to admit their liability to punishment for acts which are the result of their corporate deliberation and performed in pursuance of their corporate aims. Thus, in one well-known case, a railway company was held punishable by fine for an illegal stoppage of the highway, and, in general, corporations can be prosecuted for acts of criminal negligence, breaches of regulations imposed for the security of the public, and similar offences (*a*). Precisely how far this criminal responsibility can be extended is not quite clear.

(*y*) Garçon, Code Pénal annoté on art. 5, § 93.

(*z*) Pollock and Maitland, *op. cit.*, I., pp. 661, 662.

(*a*) Cf. *R. v. Great North of England Rail. Co.* (1846), 72 R. R. 262 ;

In France the mediæval tradition was broken by the Revolution, and the rule is now fixed that no criminal proceedings can be commenced against a juristic person (b). The same rule is adopted in Egypt. Nevertheless, cases occur in which it is the corporate body which ought to be held responsible rather than any individual natural person, as, for example, when a juristic person has broken some Tanzim regulation. In such cases the administrators or directors of the corporate body are prosecuted personally (c).

Finally, it is necessary to consider the capacity of juristic persons as limited by the aim with which they were established. As already pointed out, one of the principal recommendations of the theory of juristic personality is that it enables us to make an effectual separation between the interests of the group and those of the individual members of the group. Now no limitations need be placed upon the character of the interests of a natural person to which the law will give effect, except those supplied by public policy and the rules of morality. A man may acquire rights and incur duties for any purpose he may choose; he may use his own property for any ends and enter into contracts of any kind which to him may seem good. But the interests of a group or of an institution are less broad in their character. For it is an essential feature of group or of institutional life that it is governed by certain definite aims determined by the condition of its existence (d). To take an obvious example, let us suppose a group of men decide to start business together as cotton manufacturers, each contributing a share of the capital. and see Carr, *op. cit.*, pp. 87 ff.; "Laws of England," VIII., §§ 858, 859.

(b) Garçon, *loc. cit.*, §§ 94-115. But see S. 1901, 1-57 and the note of M. Roux to this case.

(c) Grandmoulin, "Droit Pénal égyptien indigène," §§ 767, 770.

(d) Cf. Gaz. Trib., II., p. 122 (*Gouvernement Égyptien v. 7<sup>te</sup> de Fontarce*).

The existence of the association would be, in such a case, dominated by the object with which it was established, and it would not appear to be in conformity with the terms upon which the group was formed that even a majority of the members should resolve to abandon the agreed purpose and devote the group funds (say) to buying motor cars and running them for hire. The limitation of the legal capacity of juristic persons is founded, therefore, upon the nature of the common group life.

When a juristic person seeks to do some act which is outside its capacity it is said to act "*ultra vires*" (beyond its powers). Thus, in the well-known English case of the *Ashbury Carriage Company v. Riche* (e) a company incorporated for the purpose of making and selling railway carriages, etc., agreed to purchase a concession for making a railway, and it was held that this agreement was *ultra vires* and consequently bad. Additional powers are, however, often conferred upon a company enlarging or altering its objects and enabling it to do acts which otherwise would be *ultra vires*, but the grant of such further powers is generally hedged round with necessary formalities so as to protect the interests of dissenting members (f).

In this connection the French rule known as "*le principe de la spécialité*" may be mentioned. This rule provides for the case of public institutions which may be the recipients of gifts or legacies from persons who desire to benefit them. Now, of course, such a gift raises no difficulty so long as the donor makes it with the object of furthering the special work of the institution. But he may perhaps attach some special charge to the gift, requiring that it shall be devoted to some purpose not directly the object for which the

(e) (1875) 44 L. J. (Ex.) 185.

(f) For the English law see Companies (Consolidation) Act, 1908 (8 Edw. VII. c. 69), s. 9. For the French law see Thaller, *op. cit.*, §§ 688 ff.

institution was founded. Here the rule intervenes and forbids the acceptance of any gift except in view of the institution's special objects (*g*).

(*g*) Capitant, pp. 191-196. See also Pélissié du Rausas in "L'Egypte Contemp.," 1918, pp. 169 ff. The learned writer is of opinion that "le principe de la spécialité" does not apply to limit the capacity of juristic persons of a private character. *Sed quære*. See Walton, "Obligations," II., pp. 166-167.



## CHAPTER XI.

### THINGS.

THE analysis of a Right reveals the existence of things as the objects of rights, the object of the right being that thing in respect of which the right is enjoyed.

Things are classified in various ways. Of these classifications the two most important distinguish between Things Corporeal and Incorporeal and Things Movable and Immovable.

The distinction between Corporeal and Incorporeal Things has arisen from a peculiar extension of the idea of a thing in law analogous to that which has taken place in connection with Persons.

In the ordinary sense of the word things are "such permanent objects not being persons as are perceptible through the senses" (a). But the word is used in law to apply not only to sensible material objects, but also to mere rights, termed things incorporeal. This use of the term "thing" has been handed down from the Roman Law. "Corporeal things," said the Roman jurists, "are such as are tangible, like land, slaves, clothing, money. Incorporeal things on the other hand are intangible and consist of rights such as inheritance, usufruct, servitudes and obligations" (b).

At first sight it must seem strange to speak of mere rights as things, and we may well ask what purpose so curious a fiction serves. The usage appears to have arisen owing to

(a) Austin, p. 368.

(b) Just. Inst., II., 2.

the fact that certain rights, in particular those of a proprietary nature, are capable of being dealt with in much the same way as material objects. They are bought and sold; they pass by succession on death; they can be claimed as the property of the holder to whom they are said to belong. The Roman inheritance (*hereditas*), for example, consisted of a bundle of rights and duties which became vested in the heir when he entered upon it (made *aditio*), and the analogy which presented itself to the occupation or seizure of the material object was so strong that it became usual to speak of the *hereditas* itself as a "thing." Similarly debts, more particularly after they became transferable by assignment, bore a likeness to material things. Such rights could be the object of a *jus ad rem* (c), and it is almost inevitable that they should themselves be spoken of as things (d). This classification of things into corporeal and incorporeal is now firmly embedded in legal terminology. It has been extended to cover proprietary rights of various kinds unknown to the Romans, so that copyrights, patent rights, shares in companies, and the like, are now spoken of as incorporeal things.

Yet if the classification be examined it will be seen to

(c) A "*jus ad rem*" is a right to a right. Thus, if I agree to transfer some right to another person, the right to call upon me to make the transfer is a right "*ad rem*." A right "*ad rem*" must be distinguished, of course, from a right "*in rem*" already explained. Indeed, rights *ad rem* are necessarily "*in personam*." Salmond, pp. 209-210.

(d) If the right thus regarded as a thing is a right *in rem* it is, of course, available against all the world, while if it is only a right *in personam*, such as a debt, it is available against the debtor or his representatives alone. It is at least conceivable that a true right of ownership might be recognized as belonging to the holder of a *jus in personam* over the right itself (the incorporeal thing), such that the creditor would be entitled to protection against third parties who sought to interfere with his claim against the debtor. This would make the analogy between the *jus in personam* and a thing very close. The step does not, however, appear to have been taken in modern law, though its possibility has been at least suggested in England. (See *Lumley v. Gye*, 95 R. R. 501; Pollock, "Law of Torts," p. 549.)

rest upon a confusion of thought not immediately apparent. When it is said that a man owns a corporeal thing all that is really meant is that he is the holder of certain indefinite rights over the things which taken together constitute ownership. From a legal point of view his ownership consists merely of rights. There is no logical ground for distinguishing between the rights of an owner of a material object and the rights of a creditor, for example, and calling the one a corporeal and the other an incorporeal thing. Both are equally incorporeal.

If the owner of a piece of land sells his land to another it is usual to say that the land is transferred, but if exact legal terminology were used we ought to say that the *rights* over the land were transferred. And this is what we do say when a creditor assigns his debt, for it is clear, in that case, that what is assigned is merely a right to recover the money owed.

If, then, we were perfectly logical, rights of ownership in material objects would be also classified as incorporeal things, and this would destroy the whole significance of the classification; or the term "thing" might be confined to material objects in respect of which rights were enjoyed, and this would have the same effect. But in order to arrive at a classification of things into corporeal and incorporeal, rights of ownership are identified with the material thing which is their object and are spoken of as corporeal, while all other rights which it is desired to treat as things are denominated incorporeal. In reality the classification has either no meaning at all as a distinction between things or is a classification of rights put into the terms of a classification of things.

An example will make this clearer. Let us suppose that Ahmed owns a piece of land at Gizeh, and Zaky, the owner of a neighbouring plot, has a right to pass over Ahmed's land in going from his own land to the high road. Using the

terminology above explained, we are accustomed to say that Ahmed owns the corporeal thing, to wit, the land, and Zaky an incorporeal thing, to wit, a right of way over the land. If however, the situation be carefully analysed, it will become clear that the only difference between the respective relations of Ahmed and of Zaky to the land over which the right of way is enjoyed is a difference in degree of legal powers of enjoyment. Ahmed has wider rights than Zaky ; in fact he is entitled to make whatever use he pleases of the land subject to the preservation of Zaky's special and definite right. Zaky's restricted right in respect of the land is spoken of as an incorporeal thing owned by Zaky, and if we followed the same terminology in speaking of Ahmed's rights we should have to speak of him as owner of unrestricted rights over the thing. This would be inconvenient, so we speak of the person who holds unrestricted rights over a thing as owner " of the thing," and of a person who holds restricted rights *in rem* over a thing as owner of a right only, and classify such a right as an incorporeal thing.

Again, there exist many proprietary rights *in rem* which are not enjoyed with reference to any particular material thing. Thus the copyright of this book is a proprietary right *in rem*. It is a right against all persons which consists in a claim made by me and protected by the law that no person without my consent shall during a certain number of years reproduce this book. Clearly this right may have money value, for people may wish to get copies, and I shall then be able to require money payment for the copies made with my consent. This right of mine can be assigned ; it will on my death pass to my heirs, and so on. Now, we are so accustomed to think of things as the normal objects of ownership that when we come across a right *in rem* of this kind which has money value we tend to apply the same terminology in such cases as we use in speaking of ownership of things, and thus we speak of the " copyright " as a thing,

an incorporeal thing, the object of a right of ownership. And we go still further, for in speaking of many rights "*in personam*," which are proprietary and which are easily assignable and often sold, we use the same terms. Thus a share in a company which is really only a right against the company to be paid a share of the profits, and to be repaid in certain events the capital sum, is spoken of as an incorporeal thing. Even an ordinary debt is often so treated. Thus in English law we distinguish between "*choses in action*" (debts), and "*choses in possession*," (material things). English lawyers use these curious hybrid French expressions because Norman-French was once the legal language, just as many French expressions are used in talking in Arabic about the Egyptian law. But the point to be noted is that the debt which is merely a right *in personam* is spoken of as a thing (*chose*).

This curious but convenient legal use of the term "thing" must be carefully noted. The right so treated as a thing, whether it is *in rem* or *in personam*, is not really a thing, at least, it is not a thing in the same sense that a book or a piece of land is a thing. And as we are, therefore, using a fiction by pretending that it is a thing we must be careful not to assume that everything which can be said about rights over material things can also be said about "rights" over incorporeal things. It is often difficult to say precisely how far the fiction may reasonably be pressed, but certainly it must not lead to a complete assimilation. Thus if we choose to say that the debt which Zaky owes Ahmed is a thing (*chose in action*) we must not infer from this that Ahmed is owner of a thing called a debt, and is protected in the enjoyment of this thing in the same way as he is protected in the enjoyment of a book which he owns.

The second classification of things of primary importance in modern law is that which divides them into Movables (*meubles*) and Immovables (*immeubles*) (e).

(e) N. C. C., art. 1 ; M. C. C., art. 15.

Movable things are those which can be moved from place to place. Immovable things are such as are "naturally or artificially fixed and immovable and which cannot be moved from one place to another without being broken or deteriorated" (*f*). Certain things which are movable by nature are considered, for certain purposes at least, to be immovables when they are employed in connection with immovable property. These include cattle used for cultivation, machinery and industrial implements used in a factory, and so on. They are termed by French writers *immeubles par destination* (*g*).

In French and Egyptian law this classification of things is of great importance, because it effects, *inter alia*, modes of acquisition, periods of prescription, procedure in execution, and the competence of the Courts (*h*). Perhaps the most striking difference in legal treatment between the two classes is that laid down in art. 2279 of the French Civil Code, "*En fait de meubles, possession vaut titre*" (mere possession gives a right of ownership in the case of movables) (*i*). This maxim will call for further discussion later (*k*).

The distinction between movables and immovables originated in the Roman law, but was there only applied to corporeal things. In modern law, however, it has been extended to incorporeal things also. Strictly speaking incorporeal things are, of course, neither movable nor immovable, and it is necessary to find some principle upon which the distinction may be applied to them. The accepted rule is that incorporeal things which consist in a right *in rem* over an immovable shall themselves be classified as

(*f*) N. C. C., arts. 2, 3; M. C. C., arts. 16, 17.

(*g*) N. C. C., art. 4; M. C. C., art. 18.

(*h*) Cf. N. C. C., arts. 46, 47, 76; M. C. C., arts. 68, 69, 102; N. C. C. Pro., art. 34, 440 ff., 537 ff.; M. C. C. Pro., art. 35, 502 ff., 605 ff.

(*i*) Cf. N. C. C., art. 47; M. C. C., art. 69.

(*k*) See below, p. 417.

immovables (l). Thus servitudes and usufructs in respect of immovable property are immovables. Rights in *personam* with respect to immovables are, however, to be considered as movables, except, indeed, rights to the transfer of an immovable (*jura ad rem*) (m).

All other incorporeal things, including the rights in *personam* just mentioned, are classified as movable. These include rights of several different kinds. In the first place stand rights in *rem*, such as usufructs when enjoyed in respect of a movable, and rights *ad rem* to the transfer of a movable. In the same class must be placed rights in *personam* to the payment of money, shares in partnerships and companies, whether or not the property of the partnership or the company be immovable (n), annuities, copyrights, patent rights, and indeed all rights which can be regarded as "things" in the sense just explained, except those already classified as immovable (o).

The distinction between movable and immovable property represents a real difference between two kinds of wealth. From many different points of view, economic, political, and social, the difference between land and its appurtenances on the one hand and goods on the other has been, and still is, important. The distinction will, therefore, be found in most legal systems under somewhat varying forms. The ancient Roman distinction between *res mancipi* and *res nec*

(l) N. C. C., art. 2; M. C. C., art. 16, where the term *real* right is used in the sense explained above, p. 280.

(m) Planiol, I., § 2232.

(n) The juristic person is in such cases the owner of the immovable, and the right of the members to share in the profits of the concern or to be allotted proportionate parts of the assets in case of winding up is quite distinct. The members are not co-owners of the immovable.

This conclusion follows from the theory of juristic personality already explained. See also Planiol, I., § 2258.

(o) For the distinction between movables and immovables see, further, Capitant, pp. 210 ff.; Planiol, I., §§ 2191 ff.; Salmond, pp. 396 ff.

*mancipi*, the origin of which is much disputed (*p*), bore in its ultimate form a certain resemblance to that between immovables and movables. Land (in Italy), rural servitudes, and slaves and cattle were *res Mancipi*, while most goods were *res nec Mancipi*. Thus the list comprises the principal appendages movable and immovable of an Italian farm (*q*), and if it is remembered that cattle and slaves may well be regarded as "*immeubles par destination*" the similarity to the more modern classification becomes at least colourable (*r*).

Mohammedan law also distinguishes between immovables and movables (*s*), although the distinction does not, it is true, appear to have very great importance.

In English law a distinction is drawn between Real and Personal Property, which resembles pretty closely, though not exactly, the Roman and French division of things into immovables and movables. This distinction is in England of such importance that it may be said to divide the English Law of Property into two parts. Real property (land and its appurtenances) is governed by a system of law which is based upon feudal ideas and is of a highly subtle and elaborate character. It constitutes certainly the most difficult, and perhaps the most distinctive, part of the Law of England. The Law of Personal Property or goods is on the other hand much simpler and is more closely akin to the "Civil Law." The peculiarities of the English Law of Real Property are

(*p*) Gaius, II., §§ 14-17. For various theories as to the origin of the distinction, see the introduction to Moyle's edition of Justinian's Institutes, pp. 15 ff. and note on p. 17.

(*q*) Melville, "Manual of Roman Law," p. 202.

(*r*) *Res nec Mancipi* included land outside Italy and also urban servitudes. When these were brought within the range of Roman law any similarity in the distinction to that between movables and immovables broke down. In later Roman law we find the modern classification used for certain purposes, *e.g.*, for prescription.

(*s*) Kadry Pasha, *Statut Réel*, arts. 2, 3. The distinction is on slightly different lines from that recognized in French law.



bound up with the methods of land-holding in vogue in England and cannot be understood without reference to the social and political importance which the landholding class has always enjoyed in that country (*t*).

The remaining divisions of things have little importance. Three only need be mentioned.

A distinction was drawn by the Roman lawyers between things which admit of private ownership and things which could not be owned by private individuals, this latter class including things which were by nature incapable of appropriation, such as the air, and things appropriated for some public or religious purpose and consequently removed from the sphere of private rights (*u*). A third class may be formed of things which, though not incapable of ownership, are yet in fact ownerless, as for example unoccupied land and wild animals (*choses sans maître*).

These distinctions are of economic rather than of legal interest. Political Economy notices the existence of things

(*t*) English lawyers divide land and rights in land into "corporeal" and "incorporeal" hereditaments. In the case of goods they distinguish between "*choses* in possession" and "*choses* in action," the former being corporeal things, and the latter consisting of rights only.

The foreign student may well be astonished to find French words, such as "*chose*," used as technical terms of English law. This example is by no means unique. English lawyers speak of the beneficiary of a trust (see below, p. 394) as a "*cestui que trust*," and they style a certain kind of servitude a "*profit à prendre*."

In the proceedings of the English Parliament certain French phrases are also matters of common form. A bill on being sent from the House of Commons to the House of Lords is indorsed "*soit baillé aux seigneurs*." If the bill is amended by the Lords it is endorsed "*A ceste bill avesque des amendemens les seigneurs sont assentus*." When the king gives his assent to a bill he says "*le roi le veut*," and, in exercising the now obsolete right of rejection, it was the custom to use the words "*le roi s'avisera*."

These French terms are survivals of Norman influence and still keep the old Norman form.

(*u*) See Just. Inst., II., 1, §§ 1 ff.

which have value in use but not value in exchange, and, when appropriation gives no value in exchange, legal protection is neither necessary nor likely to be forthcoming. But it would be rash to say that the law is bound to limit its conception of ownership to that which can be secured by physical appropriation. The owner of the surface of the land is usually, indeed, said to own the air space above and the soil below the land *usque ad cælum et ad inferos* (x). Moreover, the law does not necessarily withdraw from private ownership things devoted to public use. In French law highways and rivers are said to be incapable of private ownership when they are open to public passage. But in English law the highways and rivers usually belong to the adjoining owners, the public right being one not of ownership but of passage only (y).

A distinction may, of course, always be drawn between the state domain (*patrimonium populi*) and things owned by private individuals, and further distinctions may be drawn between portions of the state domain according as they are used for Government purposes or are open to public enjoyment (z). But distinctions of this sort scarcely deserve a place as radical divisions of things.

(x) F. C. C., art. 552; B. G. B., art. 905. The rule is also applied in English law. One obvious result is that all minerals under the soil belong to the owner of the surface, but special mining legislation often affects the practical results of this. (Cf. the French Law of 21 avril, 1810; Planiol, I., §§ 2394 ff.) In England, however, the principle is carried to its logical extreme.

Up to the present the applications of the first part of the rule have not been of great importance, but the general use of aeroplanes will bring it into prominence and lead to the more exact definition of its meaning.

(y) As to highways, see *Harrison v. Duke of Rutland*, [1893] 62 L. J. (Q. B.) 117; *Hickman v. Maissey*, [1900] 69 L. J. (Q. B.) 511. The foreshore and the bed of river estuaries and tidal waters are usually vested in the Crown (but see Crown Lands Act, 1866, s. 7), yet even the foreshore is sometimes vested in a private owner (cf. *Brinckman v. Matley*, [1904] 2 Ch. 313).

(z) Cf. N. C. C., art. 9.

Two time-honoured classifications of things remain which also are economic rather than legal in nature. Things are distinguished as being fungible or non-fungible and consumable or non-consumable. When regarded as examples of a class, things are fungible—that is, any one example is equivalent to any other ; but when we regard the individual qualities of the thing which distinguish it from other examples of its class it becomes non-fungible. Some things, being bought and sold *in genere*, are habitually fungible ; others, of which the value depends mainly upon the possession of characteristics special to each separate article, are as habitually non-fungible. Thus corn and wine of the same quality or vintage are fungible, while land and pictures are non-fungible (a).

The distinction between consumable and non-consumable things is based on the circumstance that some things are consumed by being once used and others are serviceable for repeated user. Comparison may be made with the economic distinction between fixed and circulating capital. This distinction is sometimes confused with the preceding one because, as it happens, things habitually fungible are generally consumable. The two classifications are, however, distinct, though consumability is a characteristic of most fungible things (b).

(a) Things are fungible when they can be returned to the same value. Ihering, “*Der Zweck im Recht*,” Chap. VII., § 6.

(b) For these two classifications in the Roman Law, see Sohm, *op. cit.*, pp. 204, 305. Money, which is really non-consumable, is always classified as consumable because, by being spent, its use to the spender is exhausted.

## CHAPTER XII.

### ACTS AND EVENTS.

IN our analysis of a right we observed that every right consisted of a claim that some person or persons should do or forbear from doing some *act*.

Rights *in rem* are generally claims to forbearance on the part of others from the doing of some act. Thus my right to personal security consists in a claim enforced by the law to the forbearance by others from interference with my bodily safety. And a right of property exists when the law protects the free exercise of my will over the thing which is the object of the right by enforcing acquiescence in such free exercise on the part of others. On the other hand, rights *in personam* consist more often perhaps of claims that others shall do some act, though claims to forbearance are not uncommon. If Ahmed owes a debt to Zaky, Zaky's right against Ahmed consists in a claim enforced by the law that Ahmed shall do an act, that is, shall pay the money which he owes. But of course Ahmed's duty may consist in a duty to forbear, as when Ahmed has agreed not to open a shop in competition with Zaky within a certain radius.

There is another point of view in connection with rights from which acts are of great importance. They not only form the contents of the right, but also give rise to rights or bring about their transfer or extinction. Thus the act of agreement may bring into existence rights and duties for the parties to the agreement; the wrongful act of one person

may cause a right to compensation to arise on the part of the person injured ; the act of sale may transfer rights of ownership from one person to another. The vast importance of acts in the sphere of legal rights is not surprising when it is remembered that law exists for the regulation of human conduct. It is only to be expected that legal rights should be granted as a consequence of men's acts, and that the contents of legal rights should consist of claims that men should act or abstain from acting.

Side by side with acts as creative, translativè, or extinctive in their effect upon rights, we note the existence of *events*. As distinguished from an act, an event may be defined in this connection as a fact taking place independently of the person whose rights and duties are under consideration. Such an event may be a movement of external nature, for example an earthquake, or some other natural occurrence, as a death, or it may be the act of some person other than the person whose rights we are considering. Thus, if Ahmed sues Zaky for breach of contract for delivery of goods, Zaky's defence may be that the Government of his country has declared war against Ahmed's country and will not permit the exportation of the goods. The act of Zaky's Government in declaring war is an event if we look at it from the point of view of Ahmed and Zaky. Acts and events are coupled together under the common name of Facts (*a*).

The determination of the legal consequences of events is, of course, only another aspect of the regulation of human conduct. By creating, extinguishing, or altering the incidence of legal rights and duties as a consequence of an event the law in fact lays down rules to be observed by men in view of the event.

The importance of the act as an element of the right is best appreciated by considering from how many points of view differences in the character of the act produce differences

in the nature of the right of which it forms the contents, or to which it gives rise.

We distinguish the principal rights from one another mainly by reference to the diversity of the acts or forbearance to which the holder of each is entitled. Agreements for the hire of land, for the loan of money, for a business partnership, and so on, each give rise to rights of different kinds because the acts which can be legally claimed in accordance with the agreements are themselves different. So also the rights of an owner, of a hypothecary creditor, or of a lessee are different because the acts which each can do in connection with the land owned, hypothecated, or leased are different.

To a limited degree the character of the act which forms the content of the right is also important from another point of view. The range of the law is very wide, and the liberty it gives to individuals to arrange their own affairs as they please is extensive. The Courts are open to all comers. Yet there are acts which the law forbids and acts which the law declines to enforce. Thus, to take an obvious example, if Ahmed and Zaky agree together to commit a crime and Ahmed does not fulfil his part of the agreement, it is clear that Zaky has no legal right against him to force him to do so or to obtain compensation. For the act to be done was of such a character that the law must decline to render assistance. The agreement was directed to the accomplishment of an illegal act. In other cases the law may decline to help, not because the act is illegal, but because it is of too trivial a character, or because of some special inconvenience which would thereby result. Thus the law does not enforce payment of debts after a certain period of time has elapsed since they first became enforceable; that is to say, the creditor cannot enforce the doing of an act out of due time.

Important and interesting as are the consequences which follow from differences in the nature of the act claimed, the study of the act is of even greater interest when it is regarded

as the title to a right. Differences in the nature of the act done or the conditions under which it is done result in different effects upon the legal position of the doer. The rules which determine what rights arise from different acts and by what acts rights are transferred or extinguished form, therefore, a body of law of the first importance.

### THE ACT AND ITS LEGAL EFFECT.

An act has been defined as "a determination of the will producing an effect in the sensible world" (b). The act therefore consists of two elements, an internal effort of the will and an external manifestation of that will. The internal effort is itself sometimes spoken of as an act, but it is better to confine the term for legal purposes to will manifested externally, since the law is only concerned with outward acts. It must, however, be carefully noted that the external manifestation may be merely an abstention or forbearance from an act which might otherwise be done. So long as a man does nothing the law does not concern itself with what he intends to do, but the law often does concern itself with securing negative action. It requires persons to abstain from doing things, just as it also sometimes requires them to do things, intervening with its sanctions if they do not do them.

(b) Holland, *loc. cit.* The terminology of this part of the subject is unfortunately, not authoritatively settled. The word "act" is sometimes used to include purely mental processes (*e.g.*, "the act of deliberation"), at other times it is confined to the bodily movement consequent upon mental effort. Then again the more immediate results of bodily movement are often spoken of together with the bodily movement itself as making up the act. "If I kill you with a gun or a pistol, I *shoot* you; and the long train of incidents which are denoted by that brief expression are considered as if they constituted an act perpetrated by me. In truth the only parts of the train which are my act or acts are the muscular motions by which I raise the weapon, point it at your head or body, and pull the trigger. These, I will." (Austin, p. 427). See, for these various meanings, Austin, *loc. cit.*; Holland, *loc. cit.*; Salmond, pp. 329 ff.

According to this definition of an act it is clear that every act must be voluntary, or, to use a better term, "volitional" (c). A movement of the body which is not the result of the will or "volition" is not an act in the strict sense of the word. Thus, a somnambulist is not doing an act when he walks, nor can a movement of the body compelled by external force be said to be an act. Sometimes, however, such movements are termed acts, but are described as involuntary or non-volitional.

We must distinguish from such involuntary movements of the body the acts which a person does under moral compulsion. If Ahmed holds a revolver to Zaky's head and threatens to shoot him unless he reveals some secret, the act of Zaky in yielding and telling the secret is volitional because it involves an effort of Zaky's will. In describing such a case the Romans used the expression "*Coactus volui*" (I willed, being compelled), thus emphasizing the volitional element in the act. Yet when the compulsion is of such a character as to present to the party called upon to act an alternative to action which no ordinary person could be expected to accept, an act done under such circumstances is usually considered to have no more legal effect than is possessed by an involuntary movement of the body.

Acts are accompanied by consciousness. Consciousness involves some knowledge of the circumstances under which the act is done and foresight of the act itself. For the direction of the will towards the accomplishment of the act cannot take place unless the act itself is more or less distinctly foreseen as a consequence of the effort. The mental operation involved in foreseeing the act and directing the will to its accomplishment is termed *intention* (d). In this sense

(c) These words are derived from the Latin *volo*, "I will. The term "voluntary" is sometimes carelessly used as equivalent to "intentional" (cf. N. P. C., 147), and to avoid ambiguity it is better to use "volitional" to express the presence of will in an act.

(d) The word is derived from the Latin *intendere*, "to direct towards."



every act is intentional, since the will can only operate when directed to some end.

It is, however, with reference to the consequences of the act rather than with reference to the act itself that the term "intention" is generally used. To a greater or less extent the consequences which follow from the act may be foreseen by the doer, and when he not only foresees them, but directs his will to accomplish them, they are said to be intended by him. Thus a distinction may be drawn between acts of which the consequences were intended and acts unintentional as regards the consequences. This is the meaning of the common distinction between intentional and unintentional acts. When an act is spoken of as done intentionally what is meant is that the particular consequence which is described as following from the act was intended. To kill a man intentionally (e) or unintentionally implies that the acts which brought about the death were done with or without the intention of causing death as the case may be. The distinction between intention in the act and intention in the consequences is easily illustrated. If a man throws a brick from the roof of a house into the street he may have intended merely to throw the brick, but he may also have intended to hit a passer-by with the brick. In the latter case this consequence of his act is within his intention. The distinction is of great importance, for in many cases the legal effect of the act will vary according as the consequences were or were not intended.

The word "intention" is often used to cover not only the immediate but the remote consequences of the act so far as they were foreseen by the doer. In the case already suggested, the man who threw the brick at the passer-by may have desired by injuring him to take his revenge for some

(e) The words "voluntary" and "wilfully" are also used to convey the same idea, thus exhibiting the confusion which exists in the use of the terms "intention" and "will." (See Austin, p. 434.)

real or fancied insult, in which case it would be true to say that he intended to take this revenge by inflicting injury with the brick. Looked at from another point of view, however, the desire for revenge was the influence which prompted or moved the thrower to his action, and thus it may be described as the "motive" of the action.

The motive is therefore the desire to obtain that satisfaction which will result from the act or its consequences. That which is the motive when it prompts a man to do some act becomes intention when conceived as an end to be attained. But it is better to use the term "intention" only when speaking of the purpose immediately before the mind of the doer when the act was done and to describe the ultimate purposes of the act as the motives which prompted it (*f*).

The same terms, "intention" and "motive" may be applied to "forbearances" also. Men often intentionally refrain from action, and their forbearance produces an effect in the sensible world, albeit a negative one. A man who abstains from some act which it is his duty to do, intending by such abstention to secure certain consequences which he foresees will follow, is in the same position as one who does some act with a similar intention, and the desires which prompt him to such abstention will constitute its motives (*g*).

It may, however, be useful to remark that there is this

(*f*) Salmond, pp. 344 ff.

(*g*) Austin says (p. 437) that forbearances from acts are not willed but intended; will is only present in acts, and the forbearance is merely an intended consequence of the willing of an act contradictory to the one forborne. I think this is an unnecessary subtlety, but it illustrates the hopeless confusion of the terminology in popular use; for if I say that, being tempted to do some act, I willed not to do it, I mean that I forbore, but if I say that under the same temptation I intended not to do the act suggested, I may imply that I ultimately yielded to the temptation, the word "intention" being used in this connection to mean projects to which effect has not necessarily been given by volitional effort.

difference between action and abstention from action, that action cannot take place without will, while abstention from action only occasionally demands volitional effort. The performance of most negative duties has become with us so much a habit that active forbearance from their breach is seldom necessary. When Ahmed walks over Kasr-el-Nil Bridge he is under a duty not to interfere with any of the crowd of people he will meet, and the law will regard him as having fulfilled that duty so long as he abstains from interference. To say that the abstention of Ahmed is intentional would imply that he consciously refrained from interference, though as a matter of fact the idea of interference with the passers-by probably never enters his head. Being an ordinary law-abiding citizen, he goes about his own business and quietly leaves others to go about theirs. But the law demands that if a temptation not to abstain should arise, the citizen should then restrain himself from action by actively willing a forbearance.

Intention to secure certain consequences of the act implies some knowledge of the conditions under which the act is done. Various degrees of knowledge are possible. It may be as well, however, to advert at once to a distinction drawn by legal writers between knowledge of fact and knowledge of law.

It is often said that while ignorance of fact may usually be proved in order to escape liability, ignorance of law is no defence. In a certain sense this is true, at least in the criminal law. A person cannot avoid liability to punishment even though he prove that he was not acquainted with the article of the Code or with the Decree under which he is prosecuted. The rule may work harshly sometimes, but there is a sufficient resemblance between law and the accepted principles of morality to prevent substantial injustice (*h*).

(*h*) Austin, pp. 496 ff.; Salmond, pp. 374 ff.; Holmes, "The Common Law," pp. 47, 48.

Remark, however, that ignorance of a private right may be a defence even though ignorance of a general rule of law is not. A man who takes property which he mistakenly believes to be his own is not guilty of theft, though he has in fact taken the property of another. But in such cases the ignorance of the true legal position shows the absence of criminal intention. In Civil law, also, a person cannot escape liability merely because he did not know of the rule of law which attached legal consequences to his act. Indeed it is one of the functions of the Court of Justice to decide as to what these legal consequences will be, and the mistaken opinions upon this point of the person whose acts are in question are obviously irrelevant. And "the general presumption of knowledge of the law does so far apply, no doubt, that a person having notice of material facts cannot be heard to say that he did not know the legal effect of those facts" (i). Yet again, although ignorance of a general rule of law does not usually alter the legal consequences of a person's acts, there are important exceptions. Mistake, even of law, is sometimes a ground of defence or of action. Thus the bulk of French opinion is in favour of permitting mistake of law no less than mistake of fact as a ground for action for recovery of money paid by mistake (k).

There is indeed a certain degree of knowledge of fact with which every normal man is credited. Knowledge of the ordinary conditions of life around us is assumed to be possessed by all, and to the extent to which consequences might have been foreseen with such knowledge they are often said to be presumed to have been intended. If a man throws another out of a fourth storey window and his victim is killed by the fall the assailant will be held responsible for the death as if he had intended it, since it was a morally certain consequence of his act.

(i) Pollock, "Contracts," 7th ed., p. 453.

(k) Cf. Baudry Lacantinerie, "Des Obligations," Vol. IV., § 2832.

In this case the act is so likely to result in a particular way that a presumption of intention arises, and it is unnecessary to enquire whether the doer in fact adverted to the consequence. But it is often important in determining the legal results of the act to arrive at the state of the doer's mind with reference to the consequences. The case in which the doer intended (foresaw and desired) the consequences has already been dealt with. The only other cases to which attention need be drawn here are those in which there has been negligence on the part of the doer. He may have failed to advert to consequences which as a prudent man he should have seen to be probable results of the act and have taken precautions to avoid ; or he may have adverted to the consequences but have decided upon inadequate grounds that they would not ensue. In either case the doer may be said to have been negligent (*l*). Negligence differs from intention because it does not involve desire for the consequences, but, at the most, indifference as to what they may be. Negligence is an important ground of legal liability. The law demands that everybody should act up to a certain standard of care in order that other members of society may be adequately protected in their persons and property. Those who fall short of this standard may find themselves civilly liable for damages in compensation for the injury their carelessness has occasioned, or even criminally liable to prosecution and punishment. What standard of care is required, either as a general rule or in any particular case, is difficult to define with precision. A higher or lower standard may be demanded according to the circumstances of the case. The determination of the standard belongs to the theory of "*faute*" (*m*).

It may be noted here that the law requires that men should not only reach a certain standard of carefulness in

(*l*) Salmond, pp. 354 ff. ; cf. Austin, Lecture XX.

(*m*) See below, pp. 436 ff.

their actions by avoiding acts which may result in injury to others, but that they should also take care to do those acts which it is their duty to do and the not doing of which may be a cause of injury. Negligence is shown as often in abstention from action as in action. And here we may again make use of the distinction remarked above. Sometimes men abstain from acts which they ought to perform because they are not sufficiently alert to consider the possible consequences of their abstention, and in other cases, although they advert to the consequences, they nevertheless abstain from the doing of the act because they rashly regard these consequences as unlikely to follow. In both cases they may incur legal liability for the consequence of their abstention.

The nature of the mental state which accompanied the act is of course of great importance in determining what its legal consequences are to be. The discussion in the ensuing chapters will illustrate this fully as regards acts in the Civil Law. But, as is hardly necessary to say, the same is true in the Criminal Law. Punishment depends largely upon the mental condition of the doer. As a simple example, take the offence of homicide. The law draws distinctions between (a) wilful homicide with premeditation and without premeditation, (b) wilful homicide and homicide resulting from an act not intended to cause death, (c) homicide resulting from an act done with intention to injure, and homicide resulting from negligence. In each of these cases the distinction turns, it will be observed, upon the character of the mental state accompanying the act. And the punishments allotted are graded according to these distinctions. Moreover, though it is often said that a man's motives are irrelevant in law it is certainly not true that they are not taken into account in determining criminal penalties. Sometimes indeed the motive is at least a partial defence. Thus under art. 201 of the Native Penal Code a man who kills his wife caught in

the act of adultery is liable to light penalties only. But even when the law makes no mention of motives they may and do often constitute the ground upon which the Courts will mitigate the sentence within the large limits of their discretion.

*Juristic Acts.*—It is now necessary to notice an important distinction between acts which are done with the intention of effecting a change in legal position and those in which no such intention is present. Thus, if Ahmed makes a will by which he leaves part of his property to Zaky, his intention in doing so is to effect an alteration in the existing legal position which will not indeed take effect until his death, but which will then be brought about by the transfer to Zaky of the property now belonging to Ahmed. But if Ahmed writes a libellous newspaper article about Zaky the changes in legal position brought about by this writing, namely, the possible liability of Ahmed to criminal prosecution and the right which Zaky may have in certain events to pecuniary or other compensation for the injury done to him by the publication of the article, were obviously not within Ahmed's intention, though he may have foreseen them as possible and decided to run the risk of their occurrence.

In the first case the law attaches to the act a particular legal effect because that effect was willed by the doer. In other words, it gives legal recognition to the purpose of the doer. In the second case, however, whatever legal effect the act may have is certainly not derived from the doer's will. Even though he may have done the act in question merely in order to procure the legal result which will follow, that legal result is entirely independent of his will. Thus, if Ahmed kills Zaky in order that, as one of his relatives, he may share in the inheritance to the property, his succession to the share is not derived from his will, but is a consequence annexed by the law to Zaky's death without reference to Ahmed's intentions. It would consequently

have followed whether or not such intentions had existed (n).

Acts of which the legal effect is the consequence of the doer's will are called *Juristic Acts*. The French term them "*actes juridiques*" (o).

When legal consequences are attached to an act independently of the doer's will they are said to be due to the "act of the law" as contrasted with those which follow from the will of the doer, which are due, therefore, to the "act of the party." The legal result following from an event is obviously always due to the act of the law in this sense. This is true also of all unlawful acts, since the gist of their illegality is that the end proposed by the doer was either not permitted by the law, or could not be legally secured by the means adopted. All juristic acts are, therefore, necessarily lawful. It would not, however, be true to say that all lawful acts which have legal effect are juristic acts. Most of the acts we do from day to day are not intended to have any legal effect, yet the law may under certain circumstances attribute a legal effect to them independently of our will. If Ahmed leaves Cairo, where he has been living, and takes a house at Alexandria, his change of residence may produce an effect upon his legal position, since he may become liable to pay rates in Alexandria and become entitled to a municipal vote by reason of his residence. Yet the change of residence is not a juristic act, for its legal effect is not derived from the will of the doer.

(n) Prof. Vinogradoff draws a useful distinction between "facts in law" and "acts in law" (juristic acts). The facts in law are those facts to which legal consequences are attached. They are the facts in issue in any suit. Thus in a suit in which a portion of an inheritance is claimed the death of the *de cujus* and the relationship which his claimant bore to him are facts in issue. Juristic acts are, of course, also facts in law, with this added peculiarity that they were intentionally directed to the constitution or modification of rights. (See Vinogradoff, "Common Sense in Law," Chap. IV.)

(o) Holland, Chap. VIII., pp. 115, 116; Capitant, pp. 248, 251.



It should be remarked that, even in the case of juristic acts, the legal consequences which follow from the act are nearly always more varied than those which formed the purpose of the doer. In many cases the law attaches certain consequences to the doing of a juristic act without requiring that in each particular case the consequences shall have been within the range of the party's intention. Thus the juristic acts which produce changes in family relationship, *e.g.*, marriage, bring about alterations in legal position determined beforehand by the law and independent of the will of the parties. If they desire the dominant change in their legal relationship which marriage involves they must accept all the varied consequences which the law attaches to the new status. The same is true in connection with the law of property. The law often does more than merely sanction the will of the parties. It limits the legal operation of that will by defining certain changes of legal relation as alone possible and by compelling the parties to accept one or other of the alternatives which it presents (*p*).

(*p*) Cf. Vinogradoff, *op. cit.*, pp. 104 ff.

## CHAPTER XIII.

### JURISTIC ACTS.

THIS chapter deals with the classification of juristic acts, with conditions of their validity, and with the principal incidents which may be attached to them.

#### § 1. CLASSIFICATION OF JURISTIC ACTS.

(i.) Juristic Acts are classified primarily as either Unilateral or Bilateral. Unilateral acts are those which can be effected by the will of one person, for example, the making of a will, or the renunciation of a right of succession. Bilateral acts require the co-operation of the wills of two or more persons to their accomplishment.

Bilateral acts are “agreements” (*conventions*). An agreement has thus been defined as “the expression by two or more parties of a common intention to affect their legal relations” (a).

An agreement may be employed for the purpose either of creating, transferring, or extinguishing rights.

The word “agreement” is sometimes used in a narrower sense to denote one class of agreements only, namely, those properly described as “contracts” (*contrats*). A contract is an agreement which creates an obligation between the parties to it (b):

(a) Anson, “Principles of the English Law of Contract,” p. 3.

(b) See Salmond, pp. 307 ff., as to this. Anson defines a contract as “an agreement enforceable at law made between two or more persons by which rights are acquired by one or more to acts or forbearances on the part of the other or others” (*op. cit.*, p. 10).

All agreements are not contracts, but contracts form a very important class of agreements. As such they must be always bilateral acts and involve, consequently, two persons at least in their formation. Indeed, all contracts may be reduced to the form of an offer made by one person which has been accepted by another. The offer is sometimes tacit but more frequently express, and so also the acceptance is sometimes indicated by the doing of an act, though usually it is shown by express words. But, whether tacit or express, it will invariably be found that contract is based on agreement in the form of offer and acceptance (c).

Besides contracts, there are at least three other classes of legal agreements. The term contract is indeed sometimes broadly used to include all agreements, but this leads to confusion. It is better, therefore, to distinguish from contracts all agreements which are not solely intended to create an obligation between the parties. Three kinds of agreements which differ in this respect from contracts should be noted (d) :—

(1) Agreements the effect of which is concluded so soon as the parties have expressed their common consent in such manner as the law requires, for example, gifts, assignments, and conveyances by which rights are transferred from one person to another.

(2) Agreements intended to effect an alteration of status. Such agreements not only affect the legal relations of the parties as between themselves, but also alter their relations with third persons through the medium of rights *in rem*

(c) The traditional view is that a contract requires for its formation an agreement (or *consensus*) of the wills of the parties (*concours de volontés*). There is, however, considerable doubt whether this is really the case, the alternative view being that it is not the existence, but the expression, of a common intention that is essential. The subject is one which cannot be adequately discussed here. A brief statement will be found in Holland, Chap. VIII., pp. 258–264; and see Planiol, II., § 944.

(d) Cf. Anson, *op. cit.*, p. 3.

annexed by the law as the result of the agreement. As examples of such agreement may be mentioned marriage, and adoption.

(3) Agreements intended to extinguish rights, such as the payment of a debt.

Bilateral acts (or agreements) are themselves sometimes described as being either bilateral (or synallagmatic) or unilateral.

*Synallagmatic* agreements are those by which both parties become reciprocally bound to one another. The agreement gives rise to obligations on both sides.

Thus, an ordinary agreement for hire is synallagmatic, for it gives rise to reciprocal obligations, to serve on the one side, and to pay the agreed wage on the other.

Generally speaking, in the case of synallagmatic agreements the right of each party to require performance by the other is conditional upon his own willingness to perform the obligation incumbent upon him.

*Unilateral* agreements, in this new sense of the word, are those which result in one party alone remaining bound. An example is furnished by the contract of deposit, which, on the deposit being made, leaves the depositary alone bound by any continuing obligation.

(ii.) Juristic Acts are further classified into those which are done "*for value*" and those which are "*gratuitous*" (*à titre onéreux, à titre gratuit*). Examples of gratuitous acts are furnished by gifts, legacies, loans without interest or other return. On the other hand, sale, loan at interest, and similar agreements are "*for value*."

English law declines to recognize any contract as valid which is not made "*for valuable consideration*." This means that a contract purely gratuitous on one side is not a contract at all in England. An agreement to make a gift, for example, would have no legal effect at all.

This requirement of valuable consideration is unknown

to French law and therefore does not call here for detailed notice (e).

(iii.) A further classification of Juristic Acts is that into acts *inter vivos* and acts *mortis causa* (*entre vifs, à cause de mort*). Acts *inter vivos* produce their effect during the life of their author, while those *mortis causa* operate only after his death. A will, for example, is an act *mortis causa* because it is not intended to operate till the death of the testator.

## § 2. CONDITIONS FOR THE VALIDITY OF JURISTIC ACTS.

A juristic act is intended, according to its definition, to produce certain legal effects. Normally these effects are produced by it, in which case it may be said to be valid or to have validity.

Various circumstances may, however, prevent an act from having its intended effect. In that case the act is described as invalid. Invalidity may arise from such circumstances as incapacity of the parties, illegality of the object, or the non-observance of the forms prescribed for the doing of the act. These and other causes of invalidity will be discussed below.

Legal writers recognize two if not three degrees of invalidity. It is necessary carefully to distinguish these from one another. It must be remembered that, however carefully they may be distinguished, the licence of speech sometimes confuses the terms used, and attention is often necessary

(e) A "valuable consideration" has been defined as "some right, interest, profit, or benefit accruing to one party or some forbearance, detriment, loss or responsibility given, suffered, or undertaken by the other" (*Currie v. Misa*, L. R. 10 Exch. 162). As to the English doctrine, see Holland, Chap. XII., pp. 281 ff.; Salmond, pp. 319 ff. and for the apparent similarity between the English doctrine of consideration and the French doctrine of cause, see Salmond, p. 322.

to perceive the exact meaning attributed to the terms in various contexts.

French writers distinguish between *actes inexistant*s, *actes nuls de plein droit* (*nullité absolue*), and *actes annulables* (*nullité relative*). English writers would group the first two of these classes together as *void* acts, while *actes annulables* correspond to *voidable* acts.

*Actes inexistant*s are those which lack some element essential to their formation without which the act cannot be considered to exist. Thus, absence of will or knowledge by reason of insanity, infancy (*f*), or want of form, when some special form is required by the law, prevent the act ever being completed in the eyes of the law. It is non-existent because the essential attributes of a juristic act have never been united (*g*).

English lawyers call such acts void, or more strongly, void *ab initio*, though in extreme cases we find the phrase "a non-existent act" used. The distinction between *actes inexistant*s and *actes nuls de plein droit* is purely theoretical.

*Actes nuls de plein droit*.—As distinguished from *actes inexistant*s, these acts are such as unite all the essential elements of an act, but are struck with nullity because

(*f*) The word "infancy" is here used in its non-technical sense to mean a child of very tender years. The student may, however, note when consulting English books that in English legal language the word "infancy" is used as equivalent to the French "*minorité*" (minority), a person under twenty-one years of age being usually spoken of as an "infant" rather than a "minor."

(*g*) The use of the term "*acte inexistant*" is criticized by Planiol, I., §§ 332 ff. For the definition of such acts see §§ 345 ff. The term seems to have come into use in French law in connection with marriages, which, for special reasons explained by Planiol in the paragraphs cited, were under some circumstances described as *inexistent*s rather than *null*s. Thus a "marriage" between persons of the same sex, or one celebrated before a private person, would be termed in French law "*inexistent*." (See also Planiol, I., §§ 1004 ff.)

they contravene some rule of law, *e.g.*, immoral agreements.

As distinguished from *actes annulables* they may be classed with *actes inexistantes* as "void."

Void acts are such as have from the beginning "no legal effect at all save in so far as any party to them may incur penal consequences" (*h*).

Their nullity is absolute, *i.e.*, they are void for all the world; nor can they be confirmed by the parties, for that which never existed cannot be confirmed in its existence. Lapse of time, which may destroy a right to avoid an act, cannot affect the act void *ab initio*, for it did not need to be avoided, it was void—to use a graphic figure, it was stillborn.

*Actes annulables* contrasted with void acts, are those which are simply voidable. A voidable act is one which, though not void *ab initio*, may be made void by the exercise of a right vested in some person to avoid it.

Subject to such avoidance, the voidable act is perfectly good; it produces legal effects, and, unless avoided, will continue to produce the same effects as a valid act. Its validity cannot be questioned except by the person to whom the law has given the right to avoid it. If that person exercises his right and avoids the act it becomes void *ab initio*, not merely from the date of the avoidance—"l'acte tombe avec tous les effets qu'il avait produits; il est anéanti même dans le passé" (*i*). The person who has the right to avoid the act may, however, generally waive such right by confirming the act when the special reason which prompted the grant of such a right has ceased to exist.

Thus, (in French law) a minor who makes a purchase in his own name can, under certain circumstances, avoid his contract, but this right of avoidance is his alone. The sale

(*h*) Pollock, "Principles of Contract," p. 9.

(*i*) Maniol, I., § 343.

and purchase are not void as against all the world, but only capable of being avoided by the minor. Moreover, if the minor, after attaining his majority, chooses to confirm them, he thereby loses his right of avoidance (*k*).

The invalidity of a juristic act arises generally either from defect in the capacity of the parties or from lack of proper form, or from defect of consent or from illegality in the purpose of the act.

### (i.) *Defect of Capacity.*

The nature of capacity has been already explained (*l*). The capacity of the normal person to perform juristic acts is unlimited within the range of action allowed to him by the law, but the abnormal person has only restricted capacity, and, consequently, acts which, if performed by a normal person, would produce legal effect do not always produce that effect when accomplished by an abnormal person. In modern law the principal classes of abnormal persons are lunatics and idiots, minors, married women, aliens, and juristic persons. Systems of religious law generally recognize heresy or infidelity as giving rise to incapacity in certain respects, and temporary or special incapacities are not infrequently imposed for particular reasons (*m*).

The rules regulating capacity are "*d'ordre public*" and cannot therefore be contravened by agreement. This fact makes it sometimes difficult to distinguish clearly between acts which are invalid on the ground of incapacity and those invalid on the ground of illegality.

The distinction is, perhaps, best made with the assistance of the test suggested by Dr. Holland when explaining the

(*k*) Upon the whole of this subject see Capitant, pp. 296-301; Laniol, I., §§ 326 ff.; and as to a minor's right to rescind contracts, I., §§ 1082 ff.

(*l*) See above, pp. 301 ff.

(*m*) N. C. C., arts. 129, 130.



nature of a status, invalidity being only considered the consequence of incapacity when it arises from a peculiarity of the personality unconnected with the nature of the act in question (*n*). Thus a contract between a workman and an employer in violation of a rule of public policy regulating the relations of employers and workmen is invalid because it is illegal, although it is sometimes loosely said that the workman is incapable of making such a contract, but a sale of land by a minor is invalid because of the minor's incapacity. For the rule invalidating sales made by a minor is but one example of a general incapacity indefinitely affecting a minor's legal powers. The invalidity of a minor's sales is the consequence of a personal peculiarity and not the consequence of a general rule affecting transactions of that particular kind (*o*).

The law, in imposing a general incapacity, frequently makes provision for the performance by others, on behalf of the person under the incapacity, of the acts which that person would, if normal, himself carry out. Thus a guardian (*tuteur*) is authorized to perform for his ward (*pupille*) acts which could have been done by the ward himself had he not been under an incapacity.

In other cases, the incapacity does not deprive the person subject to it of the power to perform legally effective acts, but merely requires the observance of special formalities which secure his acting under proper advice. Thus, a ward may be prohibited from performing certain acts without

(*n*) Holland, Chap. IX., pp. 140 ff. It has been already explained that Dr. Holland treats as differences of status only those personal peculiarities which result in legal exemptions and disabilities. These are more usually described as differences of capacity.

(*o*) Briefly we may say that the law when imposing an incapacity is concerned primarily with a class of persons, and when making an act illegal it is concerned primarily with a class of acts. Thus N. C. C., art. 130, says: "Capacity is governed by the personal law of the contracting party."

the consent of his guardian. But not infrequently the law takes away capacity for the performance of the act without providing any alternative method by which it may be accomplished. Thus, a person under sixteen is, incapable, in French law, of making a will, and a person under the age of puberty is incapable of contracting a valid marriage (p).

(ii.) *Defect of Form.*

The importance of form as an element in the juristic act is much less in modern law than in the earlier systems. The performance of most juristic acts was in early law subjected to the exact observance of a prescribed ritual, the slightest deviation from which entailed the nullity of the act. The importance of form was also manifested in the rules of procedure. There existed certain recognized forms of action, in one of which it was necessary for every party to present his suit. The method of presentation in each case was regulated down to the minutest details by strict rules.

The formal character of early law may be illustrated by reference to the rules of the older Roman Law. The ceremonies of Mancipation, by which property was alienated, and of Nexum, by which money was lent, were highly formal. The ordinary contract at that time was the stipulation, which consisted in a formal question and answer, and the use of particular words for this purpose was essential. Early Roman procedure recognized only the special forms of actions known as the "*legis actiones*," in the bringing of which the greatest care to observe the proper forms was necessary. Even the later Roman procedure, under the Formulary system, was, as its name suggests, essentially formal; that is to say, the presentation of the issues of law and fact had to be made according to prescribed rules in one or other of the recognized forms of action.

(p) Child marriage is, however, allowed under Mohammedan Law.

The observance of a set form has ceased to be necessary in modern law in very many cases in which it was formerly of the essence, that is to say, in which its non-observance invalidated the act. Modern law seeks to get down below the form used to the will behind it. An interesting example of this is afforded by the history of the Roman law of contract, in which can be traced the gradual development of the idea of the "consensual" contract, *i.e.*, the contract constituted by mere agreement of the wills of the parties, and the abandonment of the older view that agreement not expressed in a special form was ineffective. Yet it must not be supposed that the requirement of a particular form for a juristic act has ceased to exist. There still remain acts which are essentially formal in their nature and as regards which non-observance of the form invalidates the would-be act, or leaves it non-existent in the eyes of the law as lacking the form in which it can alone be legally recognized. Mohammedan law indeed seems to be peculiarly free from requirements of form. Several transactions which in European countries are subjected to the observance of form rest, according to the Sacred Law, solely upon the will of the parties, however expressed (*q*). When the observance of prescribed form is demanded in modern law the requirement is generally due to the desire to secure a certain publicity for acts whose importance makes any doubt as to their existence highly undesirable. Perhaps the best example is that of marriage. In early Roman law marriage was strictly formal, but the validity of purely consensual marriages was established in the later law (*r*). The Canon Law continued the tradition, and in the Middle

(*q*) Marriages and wills may be cited as examples. Divorce, which is practically formless in Mohammedan law, can only be obtained in Christian countries, if at all, by a decree of the Courts.

(*r*) The early forms of Roman marriage were the "*confarreatio*" and the "*coemptio*," both of which placed the wife in the hand (*manus*) of the husband. The later consensual marriage did not have this effect.

Ages a valid marriage could in Europe be formed by the mere consent of the parties. During the last few centuries, however, a reaction has set in against the consensual marriage. The Canon Law was itself altered by the Decree of the Council of Trent (1563) by which marriage was required to be contracted in a church and in the presence of a priest. The secular law of European countries has also shown itself hostile to the purely consensual marriage, and requires that marriages shall be celebrated at fixed places and by persons recognized by the state as competent for the purpose(s). Other examples of acts for which the observance of particular forms is often required are furnished by wills, transfers of immovable property, hypothecs, gifts, etc. (t).

(s) In France marriage can only be celebrated in the commune in which the parties are resident or domiciled. It must be celebrated (normally) at the Mairie and before the proper "*officier de l'état civil*," who is not merely present as a witness but celebrates the marriage (F. C. C., arts. 165 ff.; and see Planiol, I., §§ 849 ff.; particularly § 862). In England marriage is no less formal, though the parties have a wider choice. They can be married either by a clergyman at church, by an "authorized person" (generally a minister of a nonconforming denomination) at a place registered for the solemnization of marriages (generally a Nonconformist chapel), or by the registrar of marriages at his office (see Marriage Act, 1836 (6 & 7 Will. IV., c. 85); Marriage Act, 1898 (61 & 62 Vict. c. 58)).

In Scotland the consensual marriage has survived, but can only be registered on a warrant from the sheriff or as the result of a declaratory action.

(t) In England a will has to be signed by the testator in the presence of two witnesses present at the same time (Wills Act, 1837 (7 Will. IV. & 1 Vict. c. 26)). Holograph wills, *i.e.*, wills wholly written in the handwriting of the testator, enjoy no exemption from the ordinary formalities of execution. In France an informal holograph will is valid, but formal wills are also in use (*le testament par acte public*; *le testament dans la forme mystique*: see F. C. C., arts. 989 ff.). Transfers of immovable property must in England be made by "deed sealed and delivered." A hypothec can in France and in Egypt be created only by "*acte authentique*," *i.e.*, by notarial act (F. C. C., art. 2127; cf. N. C. C., 557).

Although, apart from these exceptional cases, form has usually ceased to be of the essence of the act in modern law, yet the non-observance of a prescribed formality often affects its operation though it does not invalidate the act. If, for example, a transfer of an immovable be not transcribed, the transfer cannot, in French or Egyptian law, be set up as against third parties, although, as between the parties themselves, it is perfectly valid (*u*). In other cases the requirement of form is reduced to a rule of evidence. Thus the Egyptian Civil Code, following the French law, lays down that "in all suits other than commercial suits and where the sums or values involved are above P.T. 1,000, or unliquidated, the parties, provided they have not been prevented by circumstances from obtaining a document establishing the obligation or discharge, shall not be permitted to prove such obligation or discharge by witnesses or presumptions" (N. C. C., art. 215). The writing here required to prove the obligation is only required as evidence of it. Though the Court may not enforce the obligation in the absence of writing, since it remains unproved, the obligation exists and produces its effects, so far as it can do so without recourse to the Court (*x*).

### (iii.) *Vitiated Consent.*

By performing a juristic act the doer shows an intention to effect an alteration in his legal relations with others. His expectations as to the nature and circumstances of the change to be brought about must, of course, largely depend

(*u*) Loi 23 mars, 1855 ; N. C. C., 270.

(*x*) As to the exceptions to this rule in Egypt, see Halton, Vol I., pp. 419 ff. For the French law see F. C. C., art. 1341, reproducing the "Ordonnance de Moulins" of 1566. There are very similar provisions in English law (see Statute of Frauds, 1679 (29 Car. II., c. 3) Sale of Goods Act, 1893 (55 & 56 Vict. c. 97), s. 4).

As to the theory, see Capitant, p. 370 ; Salmond, p. 316 and note.

upon the accuracy of his knowledge of the conditions under which the act is done. An inaccurate knowledge of the law may lead him to expect a different result to that actually produced, and a like consequence may ensue in cases in which the circumstances of fact are not correctly known.

As a general rule the law does not allow either mistake of law or of fact to affect the validity of an act. It is clear that this must be the case where the mistake merely relates to the motives of the act. If Ahmed buys a railway ticket for Alexandria he can hardly expect the Administration to return him the money on his finding that the business which called him to Alexandria no longer demands his presence. But, even when a mistake of motive is not in issue, it is only in certain special cases that mistake will alter the legal effect of the act. If Ahmed sits down in a *café* and orders food he will have to pay for it, even though he finds that the proprietor is a person with whom he has vowed never to do business again, and if Doe, an Englishman, makes a holograph will, thinking such a will is valid according to the law of his country, his mistaken knowledge of law will not give validity to the document.

In those cases in which the law does allow mistake to affect the validity of an act no difference appears to be made, in French law at least, between mistakes of law or of fact (*y*). The nature of these cases will be briefly indicated below. Such mistakes are most common in the case of bilateral acts, since, in their case, there are two parties to be considered, each or either of whom may be labouring under some error.

From cases of mistake must be distinguished those of fraud. Fraud indeed produces mistake in the mind of its victim, but the absence of good faith may be a ground for

(*y*) See Capitant, p. 266 and note. As to English law, see Pollock, *Principles of Contract*, pp. 452 ff.

interference by the law when mere mistake would be insufficient.

In all these cases the ground of relief by the law is the vice or defect to be found in the consent to the act on the part of the person to be relieved. The word "consent" is indeed most correctly used in the case of bilateral acts because it implies an agreement of the wills of two or more persons. But in the case of unilateral acts also, similar vices affecting the will of the doer will be a ground for relief. Mistake and fraud are not the only defects affording cause for relief. The law also takes note of the circumstance that the person who has done the act may have been improperly influenced or compelled thereto, and where that is the case the validity of the act is similarly affected.

The subject opened up by these considerations is one of great difficulty. A brief sketch of the principles upon which relief is granted in cases of mistake, fraud, and duress with particular reference to French law must here suffice.

#### (a) *Mistake (Erreur).*

Mistake which affects the validity of an act is distinguished by French writers as being either "*erreur radicale*" (essential error), the presence of which makes the act *in-existent*, or "*erreur de gravité moyenne*," which makes it voidable at the option of the mistaken party (z). This classification has reference, therefore, to the effect of the mistake upon the act. Cases of mistake are, however, also classified according to the nature of the mistake itself. From this point of view, following the Roman jurists,

(z) "Mistake is a cause of nullity of consent, when it relates to the essential aspect under which the thing was contemplated in the contract": N. C. C., art. 134. Cf. art. 133; and as to the interpretation of these articles, see Halton, Vol. I., pp. 316 ff.

arrive at a distinction between error *in negotio*, error *in corpore*, error *in persona*, and error *in substantia*.

(i.) Error *in negotio* is error as to the nature of the transaction. If Ahmed signs a bill of exchange under the impression that it is a guarantee, he is mistaken as to the nature of the act done, and the mistake causes the act to be void (*inexistent*) (a).

(ii.) Error *in corpore* is error as to the identity of the thing the object of the act. If Ahmed agrees to buy a cargo of rice to arrive by a particular boat from Rangoon and there exist two boats of the same name, the parties each having a different one in mind, the mistake prevents any agreement arising, and the apparent contract is consequently void (*inexistent*) (b).

(iii.) Error *in persona* is error as to the identity of a person. In all ordinary cases a mistake as to identity is immaterial. Particularly in cases of acts à *titre onéreux* must it be generally an indifferent circumstance whether a transaction be made with one person or another. “*Un libraire vend un livre qu'on lui paie comptant, qu'importe que ce soit à Pierre ou à Paul?*” (c). So in speaking of error in contract the French Civil Code says (art. 1110), “*Elle n'est point une cause de nullité lorsqu'elle ne tombe que sur la personne avec laquelle on a intention de contracter.*”

The general rule suffers, however, many exceptions. These are based on the circumstance that, in the case of many juristic acts, both bilateral and unilateral, the identity of the person with whom the act is done is often a dominant consideration in the accomplishment of the act. This may be true in the case of contracts, is certainly true in the case of marriage, and generally in the case of gifts

(a) *Foster v. McKinnon* (1869), 38 L. J. (C. P.) 310.

(b) *Raffles v. Wichelhaus* (1864), 2 H. & C. 906.

(c) *Capitant*, p. 263.



*inter vivos* or by will. In such cases French law treats the act as *voidable* (d).

(iv.) *Error in substantia*. When there is error as to the existence of some principal attribute of the thing which is the object of the act, the act is, in French law, *voidable* at the option of the party in error.

The classical example is that given by Pothier. A person intending to purchase silver candlesticks purchases instead copper sticks plated with silver under the mistaken belief that these are solid silver, a belief not, however, induced by any representations on the part of the vendor. In such a case there exists an error as to an essential attribute of the object, and the sale may be rescinded at the buyer's option. This doctrine is based on Roman law, in which "the error avoids the contract when the difference in quality between the thing bought and that which the purchaser intended to buy is such according to commercial usage as to put the one in a different category of merchandise from the other" (e). The question has been raised whether, in cases such as these, it is necessary that the mistake as to the quality of the object should be common to buyer and seller. This would seem not to be required in French law, though some authorities have taken the contrary view. In English law it is essential that the mistake should be mutual, but it should be noted that the effect of such mistake is to make the agreement not voidable but void. Indeed, in England, this is the only effect that mistake can have upon an agreement. Its presence may prevent any real agreement being formed, but it never constitutes a vice which will render the agreement voidable (f).

(d) In English law mistake as to identity in these cases avoids the act. Cf. *Cundy v. Lindsay* (1878), 3 App. Cas. 459; and Pollock *op. cit.*, pp. 467 ff.

(e) Hunter, "Roman Law," p. 403.

(f) See for the English law, Pollock, *op. cit.*, pp. 440 ff., particularly *Smit v. Hughes* (1871), 40 L. J. (Q. B.) 221.

(b) *Fraud (Dol).*

Fraud is "any kind of artifice of which one person makes use in order to deceive another." It is of importance in law from three points of view.

1. It may constitute a breach of the penal law. With that aspect we are not now concerned.

2. It is a breach of a right *in rem* which guarantees the individual against being induced by it to assent to a transaction which causes him damage. As such it gives rise to an action for damages.

3. It may affect the validity of the juristic act induced by it.

It is this third aspect with which we are properly concerned here.

It must be remarked that the limits of fraud recognized by law are not necessarily the same as those recognized by morality. Thus, generally speaking, there must be an active attempt to deceive in order to constitute fraud such as will invalidate an act. Mere non-disclosure is not fraud unless in the particular case the law has imposed a duty upon a person to make full disclosure.

The effect of fraud upon an act which it has induced is similar to that of error. Generally it makes an act voidable at the option of the party defrauded. But the range of fraud is much wider than that of error. Thus (in French law) any fraud which has been the determining cause in inducing the contract renders it voidable even though the error it has induced has been only an error of motive (*g*). If I buy a horse because the vendor has fraudulently made me believe that mine is dead I can annul the contract for fraud; but had this error not been the result of fraud I could not have done so (*h*).

(*g*) Cf. F. C. C., art. 1116.

(*h*) Capitant, p. 268, and see generally, pp. 267 ff. As to fraud in Roman law, see Halton, Vol. I., pp. 319 ff.

(c) *Duress (Violence).*

A distinction has already been made between physical compulsion which prevents the exercise of will and moral constraint which limits the choice without destroying the will of the doer. In cases of this latter class the act is volitional, *i.e.*, it is the result of an effort of the will; but the will is vitiated by the constraint to which the doer was subjected.

Where the doer's consent to an act has been secured by constraint of this kind the act is voidable at his option, and in French law this is so whether the constraint is applied by another party to the transaction or by a stranger (*i*).

In the same category may be placed cases of what is known in English law as "undue influence." Such cases arise when a person has been induced to do some act, not by threats or fear of evil, but merely by the improper influence of some person possessing over him an authority based on an existing relation of dominion on the one part and of submission on the other, such as those of parent and child, of religious adviser and devotee, and the like (*k*).

(iv.) *Illegality.*

An act done in violation of rule of law is struck with nullity as unlawful. When the illegality arises from the non-

(*i*) N. C. C., art. 135; F. C. C., arts. 1111, 1112, 1113. The French Code expressly says (art. 1111) that duress is a cause of nullity, "*encore qu'elle ait été exercée par un tiers autre que celui au profit duquel la convention a été faite.*" A different rule is laid down in the case of fraud (art. 1116). The Egyptian Codes contain no express provisions upon this point, but the jurisprudence has followed the French law. (Halton, Vol. I., p. 318; and see the terms of art. 1 of the N. C. C., observing that the Arabic version is a mistranslation of the French original.)

(*k*) Cf. *Allcard v. Skinner* (1887), 56 L. J. (Ch.) 1052; for English law as to duress and undue influence, see Pollock, *op.*

observance of some form which the law has made of the essence of the act the nullity is due to defect of form. But frequently an act may be complete from the point of view of form and yet void on account of the unlawful character of its purpose.

The performance of an unlawful act may render the doer liable to criminal prosecution; if, for example, Ahmed hires Zaky to murder Hassan, both Ahmed and Zaky are criminally liable, and, *a fortiori*, the agreement between them is void. But it is by no means requisite that an act should be illegal in the criminal sense to make it void on account of illegality. Agreements, for example, are often avoided by the law as contrary to public policy although the parties to them are not punishable, the law conceiving the nullity of the agreement as sufficient sanction. Contracts of marriage brokerage, agreements for prostitution and sales of property legally inalienable, are examples of this class of acts (*l*).

It may be further remarked that illegality sometimes has the effect of rendering the offender liable to punishment while not affecting the validity of his act. This occurs occasionally in cases in which the observance of some form is required by law, but its non-observance is not a cause of the nullity of the act. Thus (in England) an infant is forbidden to marry without the consent of his parents or guardians, but a marriage celebrated without such consent is perfectly valid and cannot be avoided, though the infant may be punished for not having obtained it. In France the consent of the parents is essential to the act, in the sense that in its absence the marriage is voidable (*m*).

596 ff. French law is less ready to assimilate moral pressure to law properly so called; cf. F. C. C., art. 1114. But see also F. C. C., . 907, 909–911.

(*l*) Planiol, II., §§ 1009 ff.

(*m*) Marriage Act, 1823 (4 Geo. IV., c. 76), ss. 23, 24; F. C. C., 2482; and cf. *Ogden v. Ogden*, [1908] 77 L. J. (P.) 34.

Examples of acts avoided on the ground of illegality are to be found in all departments of law. Bequests for illegal purposes (for example, a waqf created for a purpose condemned by the Mohammedan religion), marriages contrary to the established marriage law (e.g., in Europe, bigamous marriages, and, in all countries, marriages within the prohibited degrees), and unlawful contracts are among the most striking examples.

With the effect of illegality may be compared that of impossibility. An act of which the object is physically or legally impossible cannot have any legal effect. Thus a sale of goods which do not exist but which the parties believe to exist is void for impossibility, and so also would be an insurance policy taken out upon the life of a man already dead. Difficult questions arise in this connection, particularly when either the illegality or, more frequently, the impossibility of performance has arisen subsequently to the making of the agreement. The discussion of these cannot, however, be further pursued here (n).

### § 3. THE MODALITY OF JURISTIC ACTS.

Juristic acts may be intended to accomplish their effects either simply and indefinitely or subject to a condition or during a term. The existence of a condition or a term is said to create a modality.

*Conditions.*—A condition is a future and uncertain event upon which the creation or extinction of some legal relation is made to depend (o).

(n) Planiol, II., §§ 1006 ff. The subject has met with much consideration in the English Courts. Pollock, *op. cit.*, pp. 398 ff.

(o) The word "condition" is often used of a past or existing fact as regards which there is some uncertainty in the minds of the parties. There is, however, a radical difference between the legal effect of a condition used in this sense and that of a condition strictly so called. If Ahmed agrees to buy certain sacks of wheat from Zaky

become consequently a conception of immense importance in England; and the law has been much influenced by it. This, however, need not concern us here, as we are mainly interested in the position attributed to the idea in French law.

The French law, recognizing as possessors all persons who have the requisite "*corpus*" and "*animus*" gives to such persons, at least as regards movables, a very effective protection. It treats them as owners, "*en fait de meubles*," says the French Code, "*possession vaut titre*" (m). Certain other conditions are, indeed, necessary in order that this consequence may follow, for the possessor must be a possessor "in good faith," i.e., he must not only be acting as owner but must believe himself to be owner (n). And even the possession in good faith of goods stolen or lost will not give ownership unless it has continued for a certain period (o).

As regards immovables, possession never gives ownership unless it has continued for a lengthy period, varying according as the possession was in good faith or not (p).

Against a person who was owner of a thing possession in good faith gives very remarkable rights. It is, indeed, "nine points of the law."

But as against other persons than the owner possession is still more effective. Even when it does not constitute ownership it, at least, raises a presumption of ownership. Thus it gives to the possessor a right to the position of defendant in an action against him for the recovery of the property. It is necessary for the plaintiff to show that he has a right superior to that of the defendant, and, if he fails to do this, the defendant is left in enjoyment of the property. If the plaintiff is owner he can, of course, set up his ownership,

(m) F. C. C., art. 2279. Cf. N. C. C., arts. 46, 607; M. C. C., arts. 68, 733.

(n) F. C. C., art. 550.

(o) F. C. C., arts. 2279, 2280; N. C. C., art. 86; M. C. C., art. 68.

(p) F. C. C., arts. 2265 ff.; N. C. C., arts. 76 ff.; M. C. C., arts. 102 ff.

but if he is not owner he will have to show a better right to the possession. It becomes particularly necessary to decide who is entitled to the possession when a contest as to ownership is pending, for the person who is accorded possession will be able to maintain it in the absence of proof of ownership by another.

This is, of course, of enormous importance. It would be often very difficult, if not indeed impossible, for an owner to prove his ownership, unless, as is the case with movables, it rest upon bare possession. Unless therefore it was necessary for the person who seeks to eject the possessor to prove that he has a better title than the possessor, rights of ownership would be very precarious. But, as it is, the owner is secure. The person who seeks to eject him will succeed only on the strength of his own better title and not because of the weakness of the defendant's title.

The law, however, goes much further than this. Not only is the possessor secure against any person other than the true owner who seeks to eject him by action at law, but he is given a right to eject by force any person who disturbs his possession. And this is the case not only when the possessor has the strict legal possession of the French law but also when he has merely possession in fact (*détention*). Any person who has lawful possession in fact of an immovable, even a *lessee*, may undoubtedly eject an intruder who comes upon the premises and will not go away when requested so to do. And the Criminal law punishes such a trespasser if he use force to secure his entry.

Further, the law protects possessors, even, in some cases, mere possessors in fact, by giving them the right to recover a possession from which they have been wrongfully ejected. This protection in French law is given by means of the so-called "possessory" actions. Now the great advantage of these "possessory" actions lies in the fact that the plaintiff who has been disturbed need only prove his possession and

the disturbance in order to obtain relief. In this respect they are to be contrasted with "real" actions (*actions pétitoires*) in which the plaintiff's ownership is the issue and not merely his possession. Clearly it is often of great advantage, even to the owner, to make use of a possessory action when he has been disturbed. Against the intruder he need not then set up his title to the ownership of the thing, often difficult to prove, but may content himself with proving possession, and his possession will be a sufficient ground for relief. Whether the person whose possession is disturbed is an owner or not is immaterial, nor can the defendant repel the action by proving that not the plaintiff, but some third party, is owner, since the question at issue is not one of ownership, but of possession.

In French law judicial protection of possession of movables is excluded by the maxim *en fait de meubles, possession vaut titre*. Three "possessory" actions are to-day recognized for the protection of immovables, namely, *la complainte*, *la réintégrande*, and *la dénonciation du nouvel œuvre*. It is unnecessary to enter into a discussion of these actions, but it may be remarked that *la complainte* is the possessory action *par excellence* and its protection can only be claimed by persons who have the *animus domini*. Their possession must, moreover, be exempt from defect (*vice*), the most important defects recognized by French law being violence and secrecy. On the other hand the *réintégrande* is granted as a protection even to persons who have not the *animus domini*, and for this and other reasons it has been claimed that it is not a possessory action at all, but a mere personal protection accorded in the interests of public order to the person having apparent control (*q*). With these actions may

(*q*) Planiol, I., §§ 2302 ff., particularly § 2309. Garsonnet holds that *la complainte* and *la réintégrande* are really the same action and subject, therefore, to the same conditions. (*Précis de la Procédure Civile*, pp. 97 ff.)



be compared the interdicts of Roman law which were designed for the same purpose (r).

*Acquisition and Loss of Possession.*

As possession necessarily implies the existence of physical control and intention, both these elements must be present in order that it may be acquired. The two elements may arise at the same moment, as when delivery is made at the time an article is sold, or the intention may arise later, so as to turn into possession a state of things which was previously detention only, as when a lessee purchases the ownership of the house leased to him (s). The physical control may be exercised through another person, as it is in the case of lessor and lessee, and indeed it may even be acquired through another person, as when a servant takes possession of a thing for his master.

Again, a person now in possession may agree to hold a thing on behalf of another person (t). This will operate a change of possession without a change of custody. Or a person holding on behalf of one may agree to hold on behalf of some one else, in which case the custody again remains the same, but the possession is transferred (u).

Loss of possession may take place by the loss of both elements simultaneously, as in the case of sale and delivery, or of abandonment, or by the loss of one element alone. For example, if a person has lost control of the object and this control has been acquired by another person who exercises it on his own behalf, it is this latter who now has possession; he who has lost control cannot retain possession by "intention" alone.

(r) As to possessory remedies see Salmond, pp. 271 ff.

(s) Known as "*traditio brevi manu*."

(t) Known as "*constitutum possessorium*."

(u) Called by English lawyers "attornment." As to these see Salmond, pp. 261, 262.

The loss of the intentional element has the same effect, an example of this being furnished by the *constitutum possessorium* already mentioned. In such cases it is the alteration of the intention of the holder which has alone effected the change of possession, since the custody remains unchanged. It may, however, be remarked that a change of intention such as will alter possession without loss of physical control must be more than a mere cessation of the previous mental attitude; "there must be a new determination of the will, a deliberate desire to transfer or abandon possession." In the case of possession held through agents the possession will continue in the principal in spite of a determination on the part of the agent to hold for himself, unless indeed there is some dealing with the object on his part sufficient to manifest his changed intention.

*Quasi-possession (or Incorporeal Possession).*

Possession, as has been pointed out, is the actual exercise of rights distinguished from the right itself. There is no reason why the conception should not be extended to rights other than the ownership of corporeal things, and in Roman law this extension had already taken place.

The possession of a right is known as quasi-possession. In reality it is just as genuine a possession as that of a corporeal thing, since each consists in the actual exercise of the acts forming the contents of legal rights (x).

§ 4. REAL RIGHTS IN THE PROPERTY OF ANOTHER:

*(Jura in re aliena.)*

One or more of the constituent elements of ownership, such as a right of possession or user, may be detached from

(x) For quasi-possession see Salmond, pp. 265 ff.; Planiol, I, § 2264 and note.

the ownership itself and granted to some person other than the owner.

When rights comprised in ownership are thus granted without operating a transfer of the ownership itself they are termed "*jura in re aliena*" (rights in the property of another) (z).

Many different kinds of rights of this kind can exist, but the three most important are (1) Usufruct; (2) Servitude; (3) Real Securities.

### (1) *Usufruct (Usufruit).*

"Usufruct is a real right to the enjoyment of a thing belonging to another, necessarily determining not later than the death of the person entitled" (the usufructuary, *usufruitier*) (a).

This definition, though absolutely correct in French law, is only correct in Egyptian law as regards usufructs created between individuals as contrasted with usufructs created by the state, since art. 15 of the Native Civil Code provides that usufructs granted by the state may be perpetual. Moreover, art. 17 assimilates the position of the beneficiaries under a waqf to that of usufructuaries and conceives the usufruct as descending in accordance with the terms of the settlement (b). In both these cases, however, the authors of the Code are merely seeking to express Mohammedan legal ideas in French legal terminology. Art. 15, indeed, is to-day of no importance. It really had reference to the position of holders of Kharadji lands, and since the Decree of 1896 already mentioned (c) these persons are no longer usufructuaries in any sense, but true owners.

(z) Latin "*jus*," a right; "*res*," a thing; "*alienus*," belonging to another.

(a) Planiol, I., § 2747; cf. F. C. C., art. 578; N. C. C., art. 13; M. C. C., art. 29.

(b) M. C. C., arts. 31, 32, 34.

(c) Above, p. 401.

In practice, usufructs hardly exist in Egypt, and this brief reference to their nature will therefore suffice.

(2) *Servitude.*

The term servitude (*servitus*) was used in Roman law to include all real rights to the enjoyment of the property of another, a distinction being drawn between those enjoyed by particular persons (personal), as for example usufructs, and those which were attached to the ownership of a particular thing (real). In modern law, however, the word is confined to the latter class of servitudes only, and in this sense a servitude may be defined as a charge or burden imposed upon one immovable for the benefit of another immovable belonging to a different owner.

The immovable for the benefit of which the servitude exists is said to be dominant ; its proprietor is the dominant owner.

The immovable over which the servitude is enjoyed is said to be servient ; its proprietor is the servient owner.

Although we speak of servitudes as being imposed upon the immovable, and imposed for the benefit of an immovable, of course, like all other rights, the right of servitude is really enjoyed by persons and available against persons. Its peculiarity is that it resides in the owner of the immovable as such, and a change of ownership of the immovable changes the ownership of the right of servitude ; to use the English phrase, it *runs* with the land.

So again the burden of the servitude runs with the servient property, *i.e.*, the law protects the dominant owner in his enjoyment of his servitude as against the proprietor for the time being of the servient property. The right is not personal, against any particular proprietor, but real, against all the world, and in particular against the person most likely to interfere, namely, the proprietor of the servient property.

The legal idea connoted in Roman and French law by the word "servitude" has many and diverse applications. The commonest and most universal examples are afforded by rights of passage, rights of watercourse, rights to light or to view, and rights of support (*d*). One well-known classification of servitudes in French law indicates the general character of the rights falling within its scope; this is the distinction drawn between servitudes which are positive and those which are negative. The former class comprises those which entitle the holder to do some act upon the servient tenement, and the latter those which merely impose a duty upon the servient owner to exercise forbearance from action. A right of way, for example, is positive because the dominant owner exercises his right by passing over the servient land, while an instance of a negative servitude is afforded by an obligation upon a servient owner not to build upon his land so as to interfere, for example, with the light or view of the dominant owner. A brief account of some of the principal rights of this kind in the French and English systems will show the width of their range.

In the first place, it may be mentioned that, in conformity perhaps with the maxim that a man should so use his own property as not to injure that of another, the law recognizes certain so-called "natural rights" as existing between neighbouring owners by reason of the natural situation of their respective properties. Such, for example, is the right to the flow of natural streams enjoyed by the riparian owners of the lower waters against those of the upper levels (*e*). The upper owner is not permitted to appropriate the water beyond due measure or to alter the direction of its flow.

(*d*) The *Mejelle* contains a series of interesting articles dealing with the mutual obligations and rights of neighbouring properties (arts. 1192 ff.), the obligation not to open windows overlooking places where women sit and go being of special importance.

(*e*) F. C. C., art. 640; "Laws of England," XI., § 607.

Another natural right recognized in England is that of forbidding the pollution of water which finds its way to neighbouring land. And again it is said that "every owner of land has as incident to his ownership the right to prevent such use of the neighbouring land as will withdraw the support which the neighbouring land naturally affords to his own land" (f). Such support may be lateral or vertical. Thus a neighbouring owner is not entitled to remove the soil from his own land so close to the edge of his boundary as to cause the adjacent owner's land to subside. And if the owner of the minerals under the land is not the same person as the owner of the surface the latter enjoys a natural right to the support of the surface so that the owner of the minerals must see to it that in his mining operations he does not cause a subsidence of the surface. These are natural rights of support, but greater rights than these, *e.g.*, rights to support of buildings on the land, may be acquired by means known to the law.

In the interests of property the law further affects owners with rights and duties which, though they cannot be termed natural since they concern artificial constructions, yet resemble natural rights in being imposed by the law irrespective of the act of the parties. Thus in Egypt, where irrigation is of immense importance, we find that the law imposes upon every owner a duty "to allow the free passage through his land of the water necessary for any land further removed from the source of water upon previously receiving payment of such compensation as may be fixed by the Courts" (g). So also "the owner of a lower storey of a building is bound to execute the works necessary to prevent the higher storey from falling" (h). Rights of enjoyment in the property of others are, however, most frequently created by agreement, by prescription, or by custom, and

(f) "Laws of England," XI., § 623.

(g) N. C. C., art. 33; M. C. C., art. 54.

(h) N. C. C., arts. 34 ff.; M. C. C., arts. 55 ff. Cf. Mejlle, art. 1192.

the character of the rights which may be so created is very varied. The English law in this connection is peculiarly interesting because many ancient rights have been preserved in that country.

English lawyers distinguish between "easements" and "*profits à prendre*" (i), the former "conferring a right to utilize the servient tenement in a particular manner or to prevent the commission of some act on that tenement," while the latter "confer a right to take from the servient tenement some part of the soil or some part of its natural products or wild animals existing upon it" (k).

Easements include most of the ordinary servitudes known to French law, but *profits à prendre* include many strange rights. In many parts of England there exist wide open spaces known as commons upon which the owners of certain houses or farms in the neighbourhood have the right to turn cattle for feeding. The right so to do is called "common of pasture" and is classified as a *profit à prendre* (l). Many other similar rights exist, all of which are the relics of an obsolete system of land tenure, of which the English law furnishes abundant specimens.

### (3) *Real Securities.*

The real rights next to be discussed are those accorded to a creditor over the property of his debtor in order to secure

(i) This expression, though French in origin, is a technical term in English law; see p. 345, note (t), above.

(k) "Laws of England," XI., §§ 477-479. Tenement means, strictly, property held by tenure, and hence is used of any piece of land.

(l) Compare "*le droit de la vaine pâture*" and "*le droit d'entrepreneur*" (Planiol, I., §§ 2430 ff.), which are the same as those known to English lawyers as "common of shack" and "common of voisinage." All these common rights arose from the mediæval common field system under which the inhabitants of a village enjoyed customary rights in common over the lands of the village.

due fulfilment of the latter's obligation. Such rights are frequently granted by the debtor himself, but in some cases they are accorded to a special class of creditors under a general rule of law.

A creditor's ordinary right against his debtor entitles him to payment of his debt out of the debtor's estate, and, should payment not be duly made, it can be enforced by application to the Courts and execution following judgment. Meanwhile, the debtor is free to sell or give away his property so long, at least, as he does not do so in fraud of his creditors ; and, by the debtor's alienation of the property, the creditor loses the power to levy execution upon it for the payment of the debt.

Creditors, however, often require a more specific security for the payment of their debts than that afforded by their general claim against the debtor's estate. This is sometimes afforded by the association of third parties with the debtor in his responsibility. Ahmed, for example, on lending money to Zaky may demand that the repayment shall be secured to him by the "guarantee" of Hassan, whom he knows to be a man of property, and this means that Hassan will be liable to pay if Zaky makes default. A security of this sort is called *personal*.

But Ahmed may prefer to obtain not an additional right against a third person, but a special right against a portion of Zaky's property. This special right has two dominant purposes ; in the first place it gives Ahmed a privilege in respect of the particular thing upon which the debt is secured, by ranking his debt for payment out of the value of the thing in priority to the debts of Zaky's remaining creditors ; and in the second place it enables Ahmed to follow the thing into the hands of Zaky's alienees and to execute against the property his right to payment, in despite of the rights which others may have acquired over it. It is this second feature of Ahmed's right of



security which gives to it its *real* character. It is real, just as a servitude is real, because it is attached to the thing and is available against all persons and not merely against the person of the debtor alone. Such a security is therefore termed a *real* security.

In this place it is not necessary to do more than mention one or two of the principal forms of real security employed in law. The ideal form of real security is that which gives the maximum degree of safety to the creditor and a minimum of interference with the enjoyment by the debtor of the property, pending non-fulfilment of his obligation. Three methods actually in use, which accomplish these results in various degrees, may be mentioned.

1. The English "mortgage" transfers to the creditor (mortgagee) the ownership of the thing given as security, subject to a right on the part of the debtor (mortgagor) to redeem, *i.e.*, to have the property retransferred to him upon payment of the debt secured (*m*). The effect of the form of real security known to Roman law as "*fiducia*" was similar.

The mortgagee having ownership has perfect security. The mortgagor, however, remains in actual control of the thing, although the mortgagee is entitled, should his security become endangered, to eject the mortgagor and take control himself. As owner the mortgagee can, of course, sell the

(*m*) The practical working of the mortgage system of England furnishes an excellent example of the relations of Law and Equity. The effect of the mortgage deed at Common Law is to transfer the legal ownership of the property to the mortgagee subject to the right of the mortgagor to redeem during a fixed period, usually six months. After the expiration of the fixed period the rights of the mortgagor are finally barred. At this point, however, the Courts of Equity intervened and forced the mortgagee to allow redemption at any time, however distant, on the ground that the real purpose of the transaction was to secure payment of the money and the mortgagee ought equitably to be satisfied if this purpose is accomplished. The mortgagor's equitable right to redeem is known as his "equity of redemption."

property mortgaged, but his right to do so is subject to certain conditions imposed in the interest of the mortgagor.

2. The form of security known as pawn or pledge (Fr. *gage*, *nantissement*; Lat. *pignus*; Arabic, *rehin*) transfers not ownership but actual control (possession in fact if not in law) to the creditor without affecting the debtor's ownership. The creditor obtains "a right to retain the thing pledged" until payment, and also, "a right to be paid in preference to any other person out of the proceeds of the sale thereof" (n). Pledge has the obvious disadvantage of depriving the debtor of the enjoyment of the thing, and, for this reason, its use is in practice almost entirely confined to movables (o).

3. A third form of real security, and the one most frequently used in France and Egypt when the debt is to be secured upon an immovable, is that known as Hypothec (*Hypothèque*). The debtor who hypothecates property retains both ownership and enjoyment, but the hypothecary creditor has a right to have it sold if necessary in order to obtain payment of the debt. This right of sale is a real right, since it follows the property into whosoever hands it may pass (p).

(n) N. C. C., arts. 540 ff.; M. C. C., arts. 362 ff. Cf. Mejele, arts. 706, 729. We find, however, that the Mejele recognizes the right of the pledgee to lend the thing pledged to the pledgor, and yet (*semble*) to retain the right of preference over all the other creditors in respect of the thing pledged (Mejele, art. 749). This alone seems to indicate that pledge in the Ottoman law is less "real" in character than in Roman law. Remark also that in Ottoman law the pledgee can only sell the thing pledged by order of Court (Mejele, arts. 756 ff.).

(o) Immovables may, however, be given in pledge under the French and Egyptian law (F. C. C., art. 2072; N. C. C., art. 648; M. C. C., art. 670). A pledge of immovables is called in French "*antichrèse*." It is, however, little used (Planiol, II., § 2506). A comparison may be made with the Mohammedan pledge of immovables known as "*Garuka*" (N. C. C., art. 553).

(p) Planiol, II., §§ 2645, 2646.

The hypothec possesses the advantage of causing a minimum of interference with the debtor's rights and enjoyment. There are, indeed, certain dangers in its use which can be only properly remedied by a system of public registration. In the absence of obligatory registration secret hypothecs could be made which would seriously endanger the position of unsecured creditors, and, moreover, the concealment of existing hypothecs would be easy. Registration of hypothecs is compulsory both in France and in Egypt (*q*).

(*q*) F. C. C., arts. 2196 ff. ; N. C. C., arts. 557, 565, 566 ; M. C. C., arts. 681, 689, 690.

## CHAPTER XV.

### THE LAW OF OBLIGATIONS.

#### § 1. SCOPE OF THE LAW OF OBLIGATIONS.

THE nature of a legal obligation has been already explained. Referring back to our classification of rights, it will be seen that obligations fall under the head of rights and duties *in personam* and that it is only proprietary rights and duties of this class which are generally covered by the term. An obligation exists between two persons when money or its equivalent is owing from one to the other; rights and duties *in personam* which do not increase or diminish the holder's estate do not fall within the sphere of obligations. Thus the duty of respect and obedience which a son owes to his father is outside the sphere of obligations, but the son's duty to provide the father with alimony is within it. It is true that the term is sometimes broadly used to cover all rights and duties *in personam*, but such a usage is to be avoided.

Strictly speaking, it is the abstract idea of the legal tie or bond uniting the person of inherence (*créancier*, obligee) with the person of incidence (*débiteur*, obligor) which is designated by the term obligation. The word is, however, sometimes used to signify the right claimed. More frequently still it is made synonymous with the duty owed (*a*), and it is in this latter sense that the term is most freely employed in French. Thus Planiol remarks: "*Le rapport*

• (a) Moyle, "Institutes of Justinian," Excursus V. to Book III.; see Just., III., 13 pr., and compare N. C. C., art. 90; M. C. C., art. 144

*entier s'appelle obligation ; considéré spécialement du côté passif, il prend le nom de dette ; du côté actif, le nom de créance. Mais le mot ' obligation ' est souvent pris au sens restreint, comme synonyme de ' dette ' "* (b). The word is sometimes also used to describe certain classes of documents which are evidence of a debt (c).

## § 2. CLASSIFICATION AND SOURCES OF OBLIGATIONS.

One well-known classification of obligations distinguishes those which are civil from those which are natural, the natural obligation being one which is not enforceable by action. It consists, therefore, of an imperfect right and duty (d). Another classification of greater importance is based upon the nature of the acts and forbearances forming the content of the right and duty of which the obligation consists. From this point of view obligations are distinguished as either binding a person to give something, to do something, or not to do something (*obligations de donner, de faire, ou de ne pas faire*) (e).

But the most important classifications of obligations are those which divide them according to their sources. The Roman jurists formed four classes of obligations upon this basis, distinguishing them as either contractual (*ex contractu*), quasi-contractual (*quasi ex contractu*), delictual (*ex delicto*), or quasi-delictual (*quasi ex delicto*). Modern French law follows this precedent.

The classification adopted by the Egyptian Codes is somewhat similar. Three classes are there distinguished, namely, obligations arising from agreement, obligations arising from an act or event, and obligations arising from

(b) Planiol, II., § 157.

(c) Planiol, II., § 158.

(d) As to perfect and imperfect rights, see above, p. 287.

(e) Planiol, II., § 159.

a rule of law. This classification is derived from the French Code, although it is not put forward there so prominently. The fourth title of the third book of the French Code is headed "*Des engagements qui se forment sans convention*," and the book contains two chapters dealing respectively with (1) quasi-contracts and (2) delicts and quasi-delicts. Prefixed to these chapters, however, is an article (art. 1370) laying down that "*certaines engagements se forment sans qu'il intervienne aucune convention, ni de la part de celui qui s'oblige ni de la part de celui envers lequel il est obligé. Les uns résultent de l'autorité seule de la loi; les autres naissent d'un fait personnel à celui qui se trouve obligé.*"

In a strict sense all obligations are, of course, created by the law, but there is a well-marked distinction between those which the law enforces as recognizing the will of the parties directed to their creation and those which owe their existence to the law alone (*f*). Of these latter some are antecedent and others remedial; that is to say, some come into existence without breach of any pre-existing right, and others are only created by the law to sanction a breach of right (*g*).

The will of the private individual and the fiat of the law (*i.e.*, the will of the collective community expressed by the sovereign) being recognized as the two sources of obligations, it remains to group under these heads all obligations known to the law. Those arising from contract are clearly due to the recognition by the law of the will of the parties directed to their formation, while those arising from delict (or quasi-delict) as clearly belong to the class of obligations imposed by the law irrespective of the parties' will. There remains a somewhat heterogeneous mass of obligations as regards the proper classification of some of which considerable doubt exists. This class includes quasi-contractual obligations,

(*f*) See Walton, "Law of Obligations," II., pp. 142-143.

(*g*) For the terms "antecedent" and "remedial" see above, p. 286.

obligations arising from a trust or waqf, the obligation to pay alimony, and so on.

Convenience of exposition will perhaps justify an order of treatment not the most scientific in character. It will be well in the first place to discuss the striking distinction between contractual and delictual obligations and to defer until this is completed further remarks upon those the character of which is less well defined.

### *Contractual and Delictual Obligations.*

The nature of contract has been explained in an earlier chapter (*h*). A contract was there defined as an agreement giving rise to rights *in personam*. The obligations arising from contract depend upon the nature and terms of the contract itself. Certain special contracts in general use call, indeed, for separate treatment in all systems of law. Of these the most important are sale, lease, hire, loan, suretyship, and agency. It is not, however, proposed to discuss here the particular rules which regulate these.

The obligation which arises on a contract is antecedent in character. If Ahmed agrees to build a house for Zaky, he is performing his legal duty and fulfilling Zaky's legal right in carrying out the operations necessary for constructing the house. Should he fail to perform his duty he will commit a breach of right which may be termed a wrong. The wrong is in that case a breach of a pre-existing contractual right. The commission of the wrong gives rise to a remedial right on the part of the person wronged, a right which might, of course, have as its content precisely the same act as that the non-performance of which constitutes the breach of right. Thus, if Ahmed has contracted to pay Zaky a sum of money in return for his services and fails to make the payment, Zaky's right against Ahmed is a right to enforce payment, and in

that case the antecedent and remedial rights are indistinguishable. But it frequently happens that the remedial right given to sanction a breach of contract has a different object to the antecedent right to performance. Thus in the case of the house suggested above, the remedial right given to sanction the breach of contract by Ahmed need not and, indeed, would not consist in the enforcement by the Courts of the actual performance by Ahmed of his duty under the contract, but would consist in the exaction of pecuniary compensation for non-fulfilment (i). In spite of this fact, obligations arising from a wrong which consist in a breach of contract are most naturally considered merely as the obverse of the rights under the contract and are not classified separately from them.

It often happens, however, that a person commits a legal wrong by failing to perform a duty which did not arise from contract. Such duties are imposed by the law and may be *in personam* as owing to determinate persons or *in rem* as owing to the community at large. The class of duties *in personam* created by the law falling within the category of obligations will be considered later. The case we are now considering is that of the breach of an antecedent duty *in rem* (k). Such a breach is a wrong, but it is a wrong independent of contract. No personal relation existed between the parties previous to the breach of right. Thus, if Ahmed assaults Zaky, he commits a breach of Zaky's antecedent right to personal security. Prior to the breach, the jural relation existing between Ahmed and Zaky in this connection was of a general character. It consisted in the claim by

(i) Compare F. C. C., art. 1142. "*Toute obligation de faire ou de ne pas faire se résout en dommages et intérêts, en cas d'inexécution de la part du débiteur.*"

(k) French writers do not use this terminology, but I believe it would be correct to say that no wrongs are regarded as delicts (*délits*) except such as would be treated by English academic writers as breaches of rights *in rem* (cf. Planiol, II., § 873). The English term "tort" has a somewhat wider signification (see Salmond, p. 437).



Ahmed against Zaky and all others not to have his person violated. The personal relation between Ahmed and Zaky is brought into existence by the wrong done by Zaky, and thus it is natural to speak of the obligation as arising from the wrong, although, of course, there would have been no wrong committed in law had not there existed an antecedent right.

A wrong independent of contract is termed a delict or quasi-delict, and the obligation to which it gives rise is delictual or quasi-delictual (*l*). The distinction between contractual and delictual obligation is therefore clear, the former being antecedent in character and arising from agreement, while the latter is remedial and springs from a breach of a pre-existing non-contractual right. It should be noted, however, that the same set of circumstances may be productive of contractual and of delictual liability, that is, may constitute both a breach of a contractual right and a wrong independent of contract. If Ahmed takes a railway ticket from Cairo to Zagazig the Railway Administration thereby agrees to carry him to Zagazig and is under a contractual obligation to use due diligence in doing so. Let us suppose that owing to a collision, due to the negligence of one of the railway employees, Ahmed is seriously injured. The accident is a breach of the contractual obligations of the Administration, but it may also be treated as a breach of Ahmed's right *in rem* to personal security. It is, therefore, at once a wrong arising from contract and a wrong independent of contract.

French writers speak of liability for wrong whether contractual or delictual as arising from *faute* and distinguish

(*l*) The difference between delict and quasi-delict in modern French law is that delicts are always intentional breaches of rights, while quasi-delicts are non-intentional (wrongs of negligence): Planiol, II., § 823. In Roman law the distinction appears to have been purely arbitrary (see Sohm, "Institutes of Roman Law," pp. 424, 425).

between *faute contractuelle* and *faute délictuelle*. The nature of this distinction is disputed. There are differences of importance between the effect of a breach of contract and the commission of a delict. The point to which the student's attention is now directed is that both contractual and delictual wrongs are breaches of pre-existing rights. Differences exist between their effects because the rights broken in each case are different in character, not, as is sometimes suggested, because delict does not presuppose an antecedent right (*m*).

The French and Egyptian Codes do not deal fully with the important class of delictual obligations, and the law has been developed mainly by the jurisprudence of the Courts (*n*). The principle is laid down in very general terms in art. 1382 of the French Civil Code, "*Tout fait quelconque de l'homme qui cause à autrui un dommage, oblige celui par la faute duquel il est arrivé à le réparer*" (*o*).

The student will notice that there is a certain moral implication in the terms used in this part of our subject. "Fault" and "wrong" imply moral condemnation. They suggest that the breach of right might have been and ought to have been avoided. This might lead to the supposition that liability both contractual and delictual is founded on personal delinquency, and historically something can be found to support this view (*p*). But at the present day it

(*m*) "*La faute est un manquement à une obligation préexistante dont la loi ordonne la réparation quand il a causé un dommage à autrui*" (Planiol, II., § 863).

(*n*) See above, p. 119.

(*o*) N. C. C., art. 151; M. C. C., art. 212.

(*p*) The history of English law furnishes an interesting example. In England the modern contractual action was originally merely an adaptation of a delictual action (trespass). This interesting incident in legal history is described by Maitland in "Lectures on the Forms of Action at Common Law" (Lect. VI.) bound up with his "Lectures on Equity" to which reference has already been made.

is certainly not true as regards contractual liability and only partially true in the case of delicts.

French writers often say that "*faute contractuelle*" is presumed, and by this they mean that it is sufficient to prove the breach of contract in order to support a claim for damages. It is not necessary for the plaintiff to show any delinquency on the part of the defendant such as the use of the word *faute* would seem at first to imply. In the case of delicts, however, the opposite rule is laid down; *faute délictuelle* is not presumed, but must be proved. This is supposed to indicate a radical difference between contractual and delictual liability, but it is doubtful how far it really does so. If it is remembered that a delict is always the breach of some pre-existing right, it must be clear that proof of a breach is necessary in order to establish delictual liability. In most cases the right in question is not a right to absolute immunity from damage, but only to immunity from damage wilfully inflicted or arising from negligence. In all such cases it becomes necessary to prove the existence of the conditions which make the defendant liable in order to establish the existence of a breach of the right, and, thus, proof of *faute* is essential. But although both in ancient and modern law some personal delinquency on the defendant's part is normally the foundation for any action for damages of this character, yet there are an increasing number of cases in which such delinquency is not required, the burden of making reparation being thrown upon the person who is regarded as its cause irrespective of *faute* on his part. In English law certain wrongs (torts) are recognized as being of *absolute liability*, such that no proof that the defendant has taken all possible precautions to avoid the damages will avail as a defence. Some things a man does "at his peril" (q). Art. 1385 of the French Civil Code makes the owner of an animal liable for damage done by the animal, and in such cases *faute* is said

(q) See *Rylands v. Fletcher* (1868), 3<sup>d</sup> L. J. (Ex.) 161.

to be presumed (r). What is implied by this presumption is a matter of controversy, but according to many writers the implication is that the owner is liable whatever care he may have taken to avoid the damage. He can, however, admittedly escape liability by proving that the damage resulted from *cas fortuit* or *force majeure* (s), but this would not prevent it being true to say that his liability was independent of any moral fault on his part.

A further example of liability which appears to arise independently of "*faute*" is furnished by art. 1384 of the French Civil Code which makes people responsible for damage done by things which they have in their care. This provision is not reproduced in the Egyptian Codes, but the principle established by it has been adopted by the Courts. It is not quite clear from the jurisprudence how far the principle extends, but according to some authorities the mere fact that a person is making use of an article (e.g., a machine) which may cause damage throws upon him liability as insurer for all damage done independently of any fault on his part and, perhaps, even though the damage was the consequence of "*force majeure*." This is known in France as the theory of the "*risque créé*" (t).

However this may be, it is at least clear that the legislature has expressly made certain persons liable in damages as insurers against certain kinds of accident, independent of fault. Thus both in France and in England employers are liable to pay compensation for injury suffered by their

(r) N. C. C., art. 153; M. C. C., art. 215.

(s) *Force majeure* is defined as comprising "*tous les événements provenant d'une cause étrangère à la volonté de l'individu recherché comme responsable*" (Dalloz, "Dictionnaire de Droit"). Compare the English expression "act of God," for which see particularly *Nicholls v. Marshland* (1875), 46 L. J. (Q. B.) 174.

(t) Cf. M. Mignault in *Jour. Soc. Comp. Leg.*, XXIII., pp. 102 ff., and M. Planiol in *Revue Critique*, 1906, pp. 80, 89.

workmen in the course of their employment even though the accident was not the result of any negligence on the part of the employer (*u*). And some contend that this principle of insurance ought to be extended so as to cover all cases of damage done by the acts of others independent of the existence or non-existence of "faute." So far as reparation for the injury done is concerned, this, it is argued, ought to be provided out of a state insurance fund. The injury may be the same to the injured party whether it was prompted by malice, due to negligence, or the result of inevitable accident. And although it would be unjust to throw the burden of making reparation upon the accidental injurer, such burden could easily be borne by a state fund to which he and all other members of the community would have contributed.

The existing law of delictual obligations is, however, undoubtedly based as a whole upon the notion of moral "faute" and can only be understood in that light. Whether, by extension of the principle of insurance against accident, we ought not eventually to effect the suppression of the idea of "faute" altogether is a question for legal reformers of the future.

The breadth of the principle laid down by art. 1382 of the French Civil Code, and copied by the Egyptian Code, might justify the conclusion that any damage caused intentionally or negligently to another would be sufficient foundation for an action. The vagueness of the language is misleading, for there exists a large class of acts which cause damage and yet give rise to no liability. The French say that when a man merely exercises his rights no liability for damage will arise; he cannot be in fault unless he is not using but abusing them. This explanation does not give much assistance. An act which is an abuse of a right is nothing but an act done contrary to right, *le même acte ne*,

(*u*) L'ors 9 avril, 1908. Workmen's Compensation Acts, 1897-1906.

*peut pas être tout à la fois conforme au droit et contraire au droit (x).*

It is not, indeed, possible to discover any absolute principle which will enable us to mark off acts which constitute delicts from those which although causing damage will yet not give rise to liability. The public interest demands that, within certain vaguely defined limits, men should be left free to employ their powers as they please and to make such use of their property as seems good to them. The rights to protection against the acts of others accorded by the law are not infringed by acts which fall within these limits, even though such acts may be done with the intention of causing damage. If Ahmed builds a factory upon his land which entirely spoils the amenity of the neighbourhood and depreciates the value of Zaky's adjoining property, this gives Zaky no right to claim compensation for the damage done, even though Ahmed may have well known the injury the factory would do and may even have desired to do the injury out of hatred to Zaky. Workmen who strike work, tradesmen who start rival shops, and so on, all do damage to others, and do it intentionally, yet their action is no cause of liability. Each system of law will draw the delicate boundary line between lawful and unlawful damage at a slightly different point, but at some point a line must necessarily be drawn.

It remains to point out that the rule that he who does an act through another is himself liable (y), is expressly applied by French and Egyptian law to the commission of delicts, a master being responsible for the acts of his servant when done in the course of his employment. This liability

(x) Planiol, II., § 871. As to the interesting question of "abusive exercise of rights" see an article by Mr. Amos in *Jour. Soc. Comp. Leg.*, N. S., III., pp. 453-463.

• (y) Well known in its Latin form "*qui facit per alium, facit per se.*"

is, in fact, no more than an application of the ordinary rules of agency (z).

Contractual and delictual obligations comprise the bulk of the obligations met with in everyday life. The classes of antecedent obligations which remain are of a more exceptional character, and the true character of certain of them is a matter of controversy. These obligations will be here discussed under four heads, to wit: (1) Obligations arising from a trust or waqf, with which I shall venture to classify those arising from the French institution known as *stipulation pour autrui*. (2) Quasi-contractual obligations. (3) Obligations annexed by the law to domestic status. (4) Public obligations imposed by the law.

Referring back to our earlier statement that obligations arise either from the recognition by the law of the will of individuals directed to their formation, or are imposed directly by the law, we may describe the first of these four classes as arising, like contractual obligations, from individual will, while the remaining three may be ranked with delictual obligations as due to the independent action of the law.

#### (1) *Obligations arising from Trust or Waqf.*

The nature of a trust and the similarity existing between a trust and a waqf were discussed in the last Chapter. The essential characteristic of the trust and of the waqf is that the trustee or nazir is bound by law to administer the property subjected to the trust for the benefit not of himself but of the persons for whom it was instituted. There is an obligation existing between the trustee and the beneficiary which consists in a duty laid upon the trustee towards the beneficiary and a corresponding right against the trustee on the part of the beneficiary. In the case of a private trust or waqf the beneficiary who holds the right is a private person, while when the trust is of a public character, we may regard the

(z) F. C. C., art. 1384; N. C. C., art. 152; M. C. C., art. 214.

class of persons for whose benefit it was instituted as the persons entitled, or possibly in some cases the state as representing the common interests of the community.

Now the special peculiarity of trust obligations is that they exist independent of any contract made between the trustee and the beneficiary. When, for example, a person creates a waqf or trust for the benefit of his descendants, the descendants as they come into existence become holders of rights enforceable against the trustee or nazir which entitle them to have the property administered for their benefit. Yet these rights do not arise from a contract between them and the trustee.

It is sometimes said that such trust obligations arise from the law (a), and they are thus differentiated from contractual obligations which arise from the will of the parties. Their creation does not indeed demand any consensus of will on the part of the person bound and the person entitled; the trustee owes a duty to the beneficiary though he has never agreed *with the beneficiary* that he will owe such a duty, and the beneficiary is entitled to a right against the trustee though he has never agreed with the trustee to that effect. Nevertheless, the law does not create such obligations except as recognizing the will of private individuals directed to their formation. The obligation between the trustee and the beneficiary does not exist in virtue of a general rule of law, but is the effect of the specific recognition by the law of the will of the founder seeking to benefit third parties, coupled perhaps with that of the trustee, who, by acceptance of the trust, expresses his willingness to undertake the duties thereof (b).

French law does not contain any institution of the nature of the trust or waqf. It does contain, however, a conception

(a) Holland, Chap. XII., pp. 247, 248, 251.

(b) Thus the trust might be regarded as originating in a contract between the founder and the trustee (see Pollock, "Law of Contracts," pp. 208, 209).



which appears, within its limited scope, to possess many points of similarity to the trust and which is used for some of the same purposes. This is the *stipulation pour autrui*.

It is a generally acknowledged rule that the legal effects of a contract are confined to the contracting parties (c). The French Civil Code, however, provides (art. 1121) that stipulations for the benefit of third parties may be made if this benefit is the condition of a contract made for oneself or of a gift made to another. Thus Paul (*stipulant*) may contract with Pierre (*promettant*) that the latter shall do something for the benefit of Jacques (*tiers*), and it is quite settled in French law that Jacques will then have a right of action against Pierre for the performance of the contract, supposing, of course, that the conditions laid down in article 1121 for the validity of such a stipulation for another are fulfilled.

The right of Jacques and the correlative duty which Pierre owes to him are in this case not the result of agreement between Pierre and Jacques, and the real nature of the source of the obligation between them has been the subject of many theories and much controversy (d). All that it is desirable here to point out is that the relations of the parties correspond very closely to those existing between the founder of a trust, the trustee, and the beneficiary. An example of the working of the *stipulation pour autrui* will make this clearer (e). One of its commonest uses is to enable a man to ensure that the capital of his policy of life insurance shall be paid (say) to his widow and children. This object he accomplishes by a stipulation to that effect in his contract with the insurance company, which gives a right of action in

(c) Pollock, *op. cit.*, p. 197; F. C. C., art. 1119.

(d) See Planiol, II., §§ 1217-1226, and the notes to S. 1905-1-137, D. 1907-1-313.

(e) For an account of some of the principal uses of the stipulation, see Baudry-Lacantinerie, "Des Obligations," I., §§ 176 ff. For Egyptian cases see Gaz. Trib., IV., No. 338; V., No. 70; VI., No. 289; IX., No. 44.

respect of the money to the widow and children as beneficiaries. The same result is achieved in English law by making the company trustee of the moneys for the widow and children (*f*). Again, *stipulations pour autrui* are often used in order to create a “*fondation*,” i.e., a fund of money earmarked by the donor for some charitable purpose; the money is given to the donee charged with a condition that it shall be used for the benefit of a third person or class of persons, e.g., the poor of a town. This is merely a trust or waqf under another name.

Having regard to the similarity of function it does not seem unreasonable to classify the obligations arising from *stipulation pour autrui* with those created by trust or waqf. French writers in seeking to explain juridically the nature of the *stipulation pour autrui* sometimes employ language which shows how nearly allied the two conceptions are, and how exceptional is the character of the obligations arising from the stipulation. Thus M. Barde concludes that these obligations originate in the recognition by the law of the creative effect of the unilateral will of the *promettant* springing as it were from the contract between the *stipulant* and himself (*g*). It must, however, be admitted that there is no agreement as to the true character of the stipulation, and the view prevalent assimilates it to the “*gestion d'affaires*,” a view apparently adopted by the Egyptian lawgiver (*h*).

## (2) *Quasi-contractual Obligations.*

Under the head of quasi-contract the Roman lawyers placed certain legal relations giving rise to obligations which, though not contractual in character on account of the absence

(*f*) Compare Married Women's Property Act, 1882 (45 & 46 Vict. c. 75), s. 11.

(*g*) Baudry-Lacantinerie, *op. cit.*, § 161.

(*h*) N. C. C., art. 137; M. C. C., art. 198; and see Planiol, II., §§ 1222-1224. For a discussion of the *stipulation pour autrui* in French and Egyptian law see Walton “Law of Obligations,” II., pp. 53 ff.

of any agreement, yet had certain similarities with contract (i). The similarity is due to the fact that the obligations arising from quasi-contract are such as are usually the result of agreement. Quasi-contractual obligations arise whenever the law implies an obligation, not in recognition of an agreement, but as the result of an act which normally would be done in compliance with an agreement. When, for example, Ahmed pays money to Zaky without donatory intention, such payment is usually made in compliance with an agreement (say) of loan. But if the circumstances are such as to rebut the suggestion of loan and to show that Ahmed in paying the money thought mistakenly that he was fulfilling a legal obligation to pay, the law will bind Zaky to repay the money so paid by mistake just as it would bind him to repay money given on loan.

Quasi-contractual obligations are classified by the Egyptian Codes with delictual obligations as "arising from an act or event."

The commonest instances of this class of obligations are two in number: (1) When a person voluntarily renders some necessary service to property or business in the absence of the owner, an act which may give rise to a duty of indemnification on the part of the owner and to one of completing his service on the part of the person who has undertaken it (*gestion d'affaires*) (k). (2) When a person pays money not really due, the resulting obligation here being one of repayment by the payee (*paiement de l'indu*) (l).

It has been broadly laid down that "*nul ne doit s'enrichir injustement au prejudice d'autrui.*" Regarded as a statement

(i) Just., III., 27. For history and criticism of the term "quasi-contract," see Walton, II., *op. cit.*, pp. 143 ff.

(k) A good example is furnished by the obligation of the person whose property has been salvaged to indemnify the salvor for his expenses and trouble. Salvage is a common incident of maritime life.

(l) N.-C. C., art. 145; M. C. C., art. 206.

of legal principle this maxim shares the defects of other similar maxims. It lacks precision, but it serves to express a broad rule of legal justice of which many examples are to be found in all systems. It is because they result in the enrichment of one person at the expense of another (*enrichissement sans cause*) that the *gestion d'affaires* and *paiement de l'indu* are held to give rise to legal liability, and the language in which the Native Civil Code (art. 144) establishes the claim to indemnity on the part of the person who has acted for the benefit of another itself shows that this is the basis of his claim. "The act of one person intentionally *procuring a benefit for another* binds that other person to account for any expenses, etc." (m).

But apart from these cases in which express provision is made by the law for restitution based on *enrichissement sans cause*, the modern French jurisprudence seems inclined to admit that in all cases in which the facts warrant it the person unjustifiably enriched at another's expense is liable to an action at the suit of the person at whose expense he was enriched (*actio de in rem verso*) for the purpose of making good the latter's loss up to the amount of the gain which the former has secured (n).

### (3) *Obligations arising from Domestic Status.*

In the Native Civil Code, Chapter II. of Title II. is devoted to contractual obligations and Chapter III. contains the rules relating to Quasi-contractual and Delictual Obligations, which are described in the head-note as "created by an act or event" in contrast to those created by agreement. A third chapter is added which purports to treat of obligations "created by the law."

(m) Cf. also N. C. C., arts. 65, 131, 344.

(n) For numerous French examples see Walton, "Law of Obligations," II., pp. 166 ff., and for the general principles which govern the scope of the action *de in rem verso* in France, *op. cit.*, II., pp. 179 ff.

The only obligation mentioned under this latter head is that of making alimentary provision for relatives imposed upon members of the same family. The occurrence of rules upon this subject in the Civil Code is curious, since the subject belongs properly to the Personal Statute. Nor do the articles in question correctly state the Mohammedan law upon the subject (o). It is difficult to see why the Egyptian legislator has gone out of his way to create a special class to cover a particular species of obligation which does not fall within the purview of the Civil Code. In the French Civil Code the rules relating to alimony are placed under the Law of Persons (Family Law). This is, no doubt, the more convenient place for its treatment. The obligation to pay alimony is rightly regarded as imposed by a rule of law rather than as created in deference to the specific will of the parties. It is remarkable as possessing the peculiarity that it is imposed as an adjunct to a person's status. In modern law status is only to a limited degree the origin of proprietary rights *in personam*. Alimony is a rare example of a proprietary right arising from this cause.

#### (4) *Public Obligations.*

Of obligations imposed by the law upon citizens as a whole and consisting of duties owed to the state, we may cite as examples the duty to pay taxes (p) and to serve in the army.

### § 3. JOINT OBLIGATIONS AND SEVERAL OBLIGATIONS.

In the last chapter it was pointed out that rights of ownership might be vested in one person alone or in several in common. The same is true of obligations.

(o) See Statut Personnel, arts. 160, 161, 408, 409.

(p) The duty to pay a tax already imposed must be distinguished from the liability to be taxed, just as the right of the state to receive payment of the tax must be distinguished from the "right" to impose taxes.

Each system of law has its own methods of working out the consequences of such joint holding in the various forms which it may take. The two forms of joint holding in use in Roman law are known to modern commentators as "solidary" and "correal" (*q*). In English law an obligation may be joint, several, or joint and several. In French law the most important form of joint holding occurs in the case of "*obligations solidaires*," a term represented in the English translation of the Egyptian Codes by "joint and several obligations," though this use of an English technical term is to be regretted. It would have been better to speak of such obligations as solidary and avoid the use of English legal phraseology. *Obligations solidaires* occur when two or more persons are jointly bound or jointly entitled to the same thing but by separate obligations. There is a joint obligation object, but the obligations themselves are several. Thus, if A., B., and C. are *débiteurs solidaires* for £300, each of them owes the whole sum and each can be sued separately for the whole and must pay; but, of course, payment by one frees all the others, since it constitutes performance (*r*).

Though each debtor is bound to the creditor for the whole sum, yet as between the debtors themselves each is only liable for his share. Consequently, if one pays the whole he has a right of recourse against the others to obtain repayment to him of the shares of the debt due from them. This right was known to the Romans as the *jus regressus*.

The solidary character of an obligation may result from agreement or from special provision of the law (*s*). Thus art. 150 of the Native Civil Code provides that delictual obligations shall be joint and several (*t*). In French law

(*q*) Moyle, "Institutes of Justinian," Excursus VII. to Book III.

(*r*) F. C. C., art. 1200.

(*s*) N. C. C., art. 108; M. C. C., art. 211.

(*t*) Cf. N. P. C., art. 44. Thus one of several joint wrong-doers who has paid the whole of the damages has a right of recourse against

co-sureties of a debt are solidarily liable, but the Egyptian Codes have here innovated and specially provide that, in the absence of a stipulation for joint and several liability or circumstances which make such a stipulation implicit, the creditor has no right of action against the sureties except for their respective shares (*u*).

When, as in the case just mentioned, a creditor cannot sue any one of the debtors for the whole of the debt, there is not really a joint obligation at all. In French law, when several persons are together bound for payment of a debt, but each is liable only for his share, the obligation is said to be "*conjointe*." Thus if A., B., and C. are *débiteurs conjoints* for £300, each is liable for £100 and no more, nor can he be sued for more. There is, in fact, a separate sum of £100 owing by each of the three debtors. There are not only several obligations, but several obligation objects. The English term "joint obligation" is sometimes used in Egypt to describe this state of things, but this is not only a misuse of an English technical term, but gives a false impression of the nature of the obligation. At any rate, if the phrase is used, it must be remembered that the only ground for using it is that the separate obligation objects together form a joint whole.

When in the Code we find that an obligation is expressly stated not to be joint and several the implication is that it is "*conjointe*." Thus there is a general provision in the Egyptian Codes, following art. 1202 of the French Civil Code (*x*), to the effect that obligations created by the law are not joint and several in the absence of express enactment the others for their shares. In English law no such recourse is available under these circumstances, the maxim "*ex turpi causa non oritur actio*" being applied (see *Merryweather v. Nixan*, 1 Smith, Leading Cases, p. 383 and notes).

(*u*) See F. C. C., art. 2025; and for the *bénéfice de division* see F. C. C., art. 2026; cf. N. C. C., art. 504; M. C. C., arts. 615, 616.

(*x*) N. C. C., art. 154; M. C. C., art. 216.

to the contrary. This means that in such cases each debtor is only separately liable to the creditor for his share.

Although the examples above given are all of debtors jointly and severally liable, it is, of course, possible to conceive of creditors jointly and severally entitled, in which case any one of the creditors is competent to sue separately and to give a receipt for the whole debt. This situation is often termed Active Solidarity to distinguish it from joint and several liability to which the epithet Passive Solidarity is applied.

Egyptian law regards joint and several debtors and creditors as reciprocal agents for each other in all dealings in connection with the debt and applies the rules of agency to govern their mutual relations. The detailed explanation of the operation of this principle cannot be entered into here. It suffices to say that, as between creditors solidarily entitled, it places the creditor who sues, or who receives payment, in the position of the representative of the others, to whom he is consequently liable to account for what he receives (y).

A word may be added with reference to a peculiar form of joint obligation known to French law as "*indivisibilité*." An obligation is said to be *indivisible* when it is incapable of partial performance; the obligation, if performed at all, must be performed entirely, and if destroyed, must be destroyed for all the persons subject to it. The simplest case of this is furnished by natural indivisibility of the object. If, for example, several persons are under an obligation to deliver a thing incapable of natural division, such as a horse, there is an obvious impossibility of partial performance. The Egyptian Codes lay down that "when the performance of an obligation cannot, whether in the nature of things or in view

(y) N. C. C., arts. 107, 108; M. C. C., arts. 161, 162; and see fully Walton, *op. cit.*, II., pp. 403 ff.



of the purpose of the obligation, be divided, each of the debtors is liable for the whole, subject to his right of recourse against his co-debtors" (z).

#### § 4. TRANSFER OF OBLIGATIONS.

Early law generally regarded rights *in personam* as non-transferable. The obligation being regarded as a bond between determinate persons could not be transferred so as to be available for or against others. This is still true of certain classes of rights *in personam* which are of so personal a nature as to be obviously available only as between the original contracting parties, *e.g.*, many contracts of service.

Within certain limits, however, transfers of rights and liabilities were early admitted as taking place upon death, the heirs being liable for the debts of the deceased and entitled to sue for credits due to him. In Roman law actions on contracts were thus available by or against the heirs, though the heirs were not liable for the deceased's delicts, nor could they always bring actions upon delicts committed against the deceased (a). In the history of English law a similar distinction was drawn, though there were important statutory exceptions to the rule denying the executors' power to sue, or liability to be sued, in respect of torts committed against, or by the deceased (b).

The transmissibility of obligations *inter vivos* is, however, of greater interest for Egyptian students of European law,

(z) As to obligations *indivisibiles* see F. C. C., arts. 1217, 1218; N. C. C., art. 116; M. C. C., art. 172; and for comment see Planiol, II., §§ 780 ff.; Walton, *op. cit.*, II., pp. 431 ff.

(a) Gaius, II., §§ 112, 113. The maxim followed was "*actio personalis moritur cum persona*."

(b) Pollock and Maitland, "History of English Law," II., pp. 341 ff. The representative of the deceased has been given statutory power to sue in certain of these cases by 4 Edw. III., c. 7 (1330), 3 & 4 Will., IV., c. 42 (1833), and 9 & 10 Vict. c. 98 (The Fatal Accidents Act, 1846).

and it may at once be remarked that it is only slowly that such transferability has developed. The Roman jurists long struggled against the assignment *inter vivos* of rights *in personam*, "basing their opposition on the character of an obligation as an essentially personal relation, the parties to which could not be changed without destroying its existence" (c). The steps by which permission to transfer came ultimately to be granted are of the greatest interest as illustrating the methods of Roman legal development (d). Difficulties of the same character occurred in English legal history and, as in Roman law, a way of escape was found through the application of the doctrine of representation or agency. The assignee sued not in his own name, but as representing the assignor who was the real creditor. At a later stage, however, the assignee was allowed a direct action for the debt in his own name, and it is at this solution that modern law has generally arrived (e). The right to sue must always be carefully distinguished from liability to be sued. The latter, as a general rule, cannot be transferred *inter vivos*, a provision easily comprehensible, since, while the personality of the creditor is generally indifferent, the personality of the debtor constitutes frequently the motive for the creditor's willingness to enter into the obligation.

Although the right of a creditor to assign his claim is generally admitted in modern law, such assignment is usually regarded as binding only between the assignor and assignee until notice of the assignment has been given to the debtor. Thus, if A. owes £100 to B. and B. transfers to C. the right to

(c) Moyle, *op. cit.*, Excursus V. to Book III. at p. 479. There is a certain reasonableness in this view. In avoiding the difficulty recourse has been made to a fiction by which the obligation is regarded as a "thing" in law (incorporeal) and consequently transferable (see above, pp. 337 ff.).

(d) See Moyle's Excursus above cited for a lucid description of the process.

(e) Pollock and Maitland, *op. cit.*, II., pp. 223-226.

receive the money, A. will nevertheless be considered to have legally performed his obligation if he pays B. the money, unless he has previously received notice that an assignment has been made (*f*). The Egyptian law (Native Code), following upon this point the Mohammedan law, is even more strict, since it does not recognize an assignment as good unless the debtor has consented (*g*).

The highest degree of transferability of rights *in personam* is reached in the case of negotiable instruments. These instruments are drawn up as evidence of a debt, and the right to receive payment of the debt is held to pass by the handing over (delivery) of the instrument with or without endorsement. The debt is identified with the document itself, so that the delivery of the instrument operates as a delivery of the debt and a consequent change of ownership. Moreover, the person who is for the time being the holder in good faith of the instrument has a right to be paid the amount due irrespective of defects in his title to hold it. Thus, he may obtain by his possession a better title than the person from whom he received it, just as a possessor of movables in good faith will have a good title to the ownership although the person from whom he received the thing was not really the owner. The negotiable instrument is the product of commercial needs and the discussion of its trade uses belongs to Political Economy. The best-known instruments of this kind

(*f*) F. C. C., art. 1691 ; and compare the English rule as laid down in the Judicature Act, 1873 (36 & 37 Vict. c. 66), s. 25.

(*g*) N. C. C., art. 349. For the Mixed Law, in which the debtor's consent is not an ordinary requisite, see M. C. C., arts. 435, 436. It appears that in Mohammedan law obligations were recognized as constituting a purely personal bond, not transmissible either *inter vivos* or on death. The consents of the three parties, debtor, creditor, and quasi-assignee, were therefore necessary for the creation of what was in effect a new obligation. (See Abd El-Hamid Bey Badawi in "L'Egypté Contemp.," 1914, pp. 19 ff.) Cf. Mejlle, arts. 680 ff., where, however, the transaction dealt with is a transfer of a liability.

are bills of exchange. These take the form of orders drawn upon a debtor directing him to pay money to a person named or to such other person as this person may direct.

### § 5. EXTINCTION OF OBLIGATIONS.

The Egyptian Codes mention seven methods by which obligations may be extinguished, namely, (1) Performance; (2) Dissolution; (3) Release; (4) Novation; (5) Compensation; (6) Confusion (Merger); (7) Prescription (*h*). A brief explanation of the meaning of these terms will suffice here.

#### (1) Performance (*Paiement*; *exécution*).

Performance consists in doing the acts or observing the forbearances required on the part of the person bound. In the commonest case it consists of payment of money, and it is a well-recognized rule of Roman, French, and Egyptian law that payment may be made by some person other than the debtor and even against his wish (*i*). A third party who pays the debt may, however, obtain thereby the right to recover the amount paid from the real debtor, so that the effect of such payment is merely to change the person of the creditor. This right of recourse is said to be due to *subrogation*. Subrogation thus causes a transfer of the creditor's rights to the person who has paid. The latter stands henceforth in the original creditor's shoes for the purpose of obtaining payment (*k*).

(*h*) N. C. C., art. 158; M. C. C., art. 221; cf. Holland, Chap. XIII., pp. 330 ff., and see fully Walton, *op. cit.*, II., pp. 443 ff. Dr. Walton mentions as additional modes of extinction: (1) expiration of the time limited by the parties for the duration of the obligation; (2) death of the creditor and debtor in certain cases.

(*i*) Just., III., 29 pr.; F. C. C., art. 1236; N. C. C., art. 160; M. C. C., art. 223.

(*k*) N. C. C., arts. 161-164; M. C. C., arts. 224-227. As to payment with subrogation, see Planiol, II., §§ 473 ff.

(2) *Dissolution (Résolution).*

By this is meant the occurrence of some event which excuses performance and consequently dissolves the legal bond between the parties. Impossibility of performance arising subsequent to the contract will thus annul the obligation to perform (l).

(3) *Release (Remise).*

The release by the creditor of the debtor from his obligation will naturally free him from liability. The mere agreement of the parties to a discharge of the obligation has not, however, always been regarded as sufficient, since, in the case of formal contracts, it was requisite that the release to be effective should follow the same forms as were essential to the creation of the obligation. In modern French law, however, release has ceased in any case to be formal (m).

(4) *Novation.*

Novation consists of the extinction of an obligation by the creation of a new one in its place (n). The creditor and debtor may, for example, annul the previous obligation by mutually agreeing to substitute a new one for it; or the creditor may agree with a third person that he shall become debtor in the place of the original debtor so that the obligation of the new debtor shall be substituted for that of the old one (o).

It must be noted that the operation known as novation differs radically from transfer of an obligation, though in some of its forms it appears to produce similar results.

(l) N. C. C., art. 177; M. C. C., art. 240.

(m) N. C. C., art. 180; M. C. C., art. 243; and see Planiol, II., § 667.

(n) N. C. C., art. 186; M. C. C., art. 249.

(o) N. C. C., art. 187; M. C. C., art. 251.

Novation involves a *new* obligation which is substituted for the old one; transfer, on the other hand, keeps the old obligation on foot, merely altering the persons who are bound by it.

(5) *Compensation (Set-off)*.

The English word "compensation" is here used as equivalent to the French *compensation*.

Compensation extinguishes debts by the mutual setting off of the liabilities of each party against one another. In French and Egyptian law it operates by effect of law (*de plein droit*) even without the knowledge of the parties, the two debts cancelling each other rateably from the moment at which they co-exist (*p*).

(6) *Confusion (Merger)*.

Where a person unites in himself the two capacities of creditor and debtor the obligation is said to be extinguished by Merger. The French term is *confusion*, and in the English translation of the Egyptian Codes the English word "confusion" is used in this sense (*q*).

(7) *Prescription*.

The nature of prescription has already been explained, and a distinction was then drawn between acquisitive prescription, which is a title to rights, and extinctive prescription, which merely extinguishes the pre-existing right. The right extinguished by prescription in the case of obligations is not the obligation itself, but merely the right of action upon it; it is the remedial not the antecedent right which ceases to exist (*r*). A right which has become unenforceable because

(*p*) N. C. C., art. 192; M. C. C., art. 256.

(*q*) N. C. C., art. 202; M. C. C., art. 266.

(*r*) N. C. C., art. 204; M. C. C., art. 268. These articles speak of the obligation as extinguished, but this is only a careless use of language.

action upon it is barred by lapse of time furnishes an example of an imperfect right or natural obligation in the sense explained above (s).

(s) Cf. Mejele, art. 1674, "Length of time does not destroy a right. Thus if in an action which is brought after the expiration of the time of prescription the defendant admit before the judge that really he still owes to the plaintiff that which is demanded by him the prescription is not taken into consideration."

## CHAPTER XVI.

### REMEDIES.

FOR every breach of right the law provides some remedy. *Ubi jus, ibi remedium* (whenever a right exists, some method of enforcing it must be provided). This maxim is of general application. The only exception is furnished by the so-called "imperfect" rights (*a*) which the law recognizes as forms of defence, but not as grounds of action.

Historically speaking it would be more correct to say that the existence of a right has depended upon the grant of a remedy than that the remedy is a necessary inference from the recognition of a right. Early law invariably shows us the law in the form of remedies rather than of general rules conferring rights. Certain forms of legal process were recognized, and each of these had a limited scope. If the person who claimed a right (to use the modern phrase) could not bring his claim within one of the recognized forms of action, he was bound to fail. As has frequently been mentioned in the foregoing pages, law was not first presented to men in the form of general rules. The general rule has been arrived at by a process of reasoning. The earliest form of state-enforced law seems to have consisted in the willingness of the "central" authority to exercise its power for the benefit of the individual if, and only if, the issue could be formulated in some recognized form. At the present day rights are established by law, and the provision of a remedy follows as a necessary inference. If the law gives a right,

(*a*) See above, Chap. VIII.



there is always some mode by which it may be enforced. In early times the existence of a right depended upon the fact that there was a remedy.

This is well illustrated both by the history of Roman and of English law. The history of both of these great systems of law started with the recognition of forms of action. The state said, as it were, to the suitor, "We have such and such different kinds of action which you may use. This kind of action which we will call action A can be brought in such and such circumstances; that kind of action which we will call action B, in such other circumstances, and so on. If the state of the facts is such as to justify your using action A or action B, or any other of our actions, make use of the appropriate one. If the facts do not permit you to bring any of these actions, your so-called right must go unprotected." Nowadays the state speaks in different terms. It says in effect, "If the facts of your case are such as to bring you within such and such a general rule or statement of law, you have only to state the facts to the appropriate Court, and you will get judgment."

The earliest Roman law knew only of a very few kinds of actions, known as *legis actiones*, and these had a strictly limited scope. Later on many new kinds of actions were instituted, and the Prætor added largely to the number. The form of the action was constituted in this later stage by the "*formula*" which the Prætor drew up containing a statement of the issue between the parties upon which the judge was to decide. If the suitor was unable to bring his case within the terms of one of the *formulae* which the Prætor was willing to grant, he had no action.

In England action was and still is commenced by writ. Nowadays the writ is simply a summons to the defendant to appear before the Court to answer a claim made by the plaintiff; the plaintiff will not fail because he has chosen the wrong writ; he will fail only if the facts which he alleges

do not bring his case within a general rule of law: But in earlier English law the position was different. Only certain kinds of writ were known. Each writ began a separate kind of action. The plaintiff had to be careful to choose the right writ. If he sued out a writ which was not appropriate for his case he would lose the action, even though by the use of some other form of writ he might have succeeded.

It is not necessary, here, to exhibit the steps whereby this stage of the law was gradually superseded and forms of action were abolished (b). There are still some survivals of the older state of things even in the law of to-day. But they are mainly survivals of nomenclature rather than survivals of a system. In France lawyers still speak of bringing a "*revendication*" or a "*complainte*," and in England we speak of actions of trespass, of ejectment, of trover, and the like. But the civil procedure of to-day does not generally require a plaintiff to say what kind of action he is bringing. He states his case and the Court gives him justice in accordance with the law applicable thereto.

But though forms of action have disappeared for all practical purposes, there still remains in use a classification of actions according to the nature of the remedy sought. We have, therefore, now to ask what are the different kinds of remedies which the law recognizes or administers.

In the first place the law sometimes, though rarely, authorizes the injured party to "take the law into his own hands," and enforce his right without application to the Court. The simplest example of this permitted self-help is furnished by the recognition of the right of a person who is attacked to defend himself by force, and in most systems of law this permission is extended to justify the use of force to repel also serious attacks upon property (c). The civil law

(b) The student should consult Dr. Walton's "Historical Introduction to Roman Law," and Mr. Jenks' "Short History of English Law,"

(c) N. P. C., arts. 209 ff. ; Draft Penal Code, arts. 36 ff.

also, furnishes us with several examples. Thus, in England, a person may "abate a nuisance," that is to say, he may in a summary manner, and without recourse to legal proceedings, do whatever is necessary to cause the nuisance to cease. What acts or omissions constitute a "nuisance" in English law we need not here examine, but as an example we may take the omission on the part of a landowner to cut boughs of trees which overhang his neighbour's property. The person injured may cut the boughs himself. This is an abatement of the nuisance (*d*).

Again, the possessor of property may forcibly eject a person who intrudes (trespasses) upon his possession. But whether a possessor may use force to regain a possession which he has lost is doubtful. Many systems of Penal Law punish a person who attempts by force to regain possession of an immovable, though he may have the better right to possess (*e*); and the law generally denies to a person who has lost possession of movables the right to recapture them (*f*). The right of retention of goods which the law gives (for example) to innkeepers in respect of their guests' luggage may be also presented as a form of self-help (*g*).

So, again, the right of a landlord to distrain upon (seize) goods of his tenant when rent due has not been paid is a form of self-help. It is not necessary for the landlord who puts in a distraint to apply to the Court for authorization so to do, and in England, though not in France, even the sale of the

(*d*) "Laws of England," XXI., §§ 932 ff.

(*e*) N. P. C., arts. 323 ff.; Draft Penal Code, arts. 455 ff. For English law see Statute of Forcible Entry, 5 Rec. II., stat. 1, c. 7 ("Laws of England," IX., §§ 936 ff.). But the possession regained is lawful. See *Hemming v. Stoke Poges Golf Club* (1920), 1 K. B. 720.

(*f*) Cf. O. B., XII., No. 136. But English law appears to recognize such a right. See L. Q. R., 1912, pp. 262 ff.

(*g*) For the Innkeepers' Lien in English law see "Laws of England," XVII., §§ 659 ff.; in French law, Planiol, II., §§ 2425 ff.

goods seized is effected without the intervention of the Court (h).

But in spite of these and other examples which might be given (i) it is true in a general sense to say that the law will not permit men to enforce their rights by their own strength, but requires them to obtain authority from the Courts. The state, indeed, *i.e.*, the administrative authorities of the state, have wider powers, and are often allowed to execute the law and to enforce their orders without recourse to the Courts, in which case the private person, injured by any alleged illegality on their part has his remedy by legal process. . We have now to consider what kinds of remedial action the Courts will apply when rights are infringed.

One might suppose that normally the law will seek to secure that a person who has done an act which infringes a right, or omitted to do an act which another has a right to expect from him, shall be compelled to undo the wrongful act or to do that which he has not done as the case may be.

Within certain limits the law is, indeed, directed to secure this result. We must, however, here distinguish between judgment and execution. The judgment is the declaration by the Courts of the rights of the parties. Often the judgment is all that the parties require. They are dubious as to what the rights are, and go before the Courts merely to obtain an authoritative declaration. Neither litigant has sought to

(h) For Distress in English law see, "Laws of England," XI., §§ 198 ff. Compare in French law the process of "*saisie gagerie*." A *saisie exécution* in virtue of a *titre exécutoire* may also be said to be a form of authorized self-help. Compare also the *manus ejectio* of Roman law and the right (now abolished) of a creditor to seize a debtor's person in execution by writ of *capias ad satisfaciendum*.

(i) Has a husband the right to force his wife to submit to the exercise of his marital rights? In England, certainly, the husband cannot restrain the actions of his wife if she refuses to live with him (*R. v. Jackson*, 60 L. J. (Q. B.) 346), and even a decree of restitution of conjugal rights is not enforceable.

infringe the other's rights, and once the rights are declared no further action on the part of the authorities is necessary. It is the true judicial function to declare rights, and the judge as such has no further duty to perform once this declaration has been made. If a dispute arises as to the heirship to an estate, the declaration of rights by the judgment is frequently all that the parties require. They will themselves execute the judgment, by regulating their relations in accordance with the terms of the judgment. The remedial action of the Courts may even take the form of a mere declaration upon which no execution is possible. Thus, under the Declaration of Legitimacy Act, 1858, any British subject may petition the Court for a declaration of his legitimacy. Such a declaration does not prejudice any person who was not a party to the proceedings, and is of the nature rather of an *ex parte* opinion of learned lawyers upon a point which interests the applicant, but may interest no one else (*k*).

Usually, however, the law cannot be invoked unless some right is in issue between parties, and although, as we have said, no attempt to infringe the rights declared by the Courts may be in prospect, yet if necessary the declaration of rights, *i.e.*, the judgment, can be made effective by execution and contemplates the possibility of forcible execution.

A judgment, however, frequently declares the successful litigant to be in possession of a remedial right (*l*) with very different contents to that of the antecedent right, the breach of which formed the subject of the action. In a very large class of cases the law cannot undo the wrong done. If Ahmed strikes Zaky, or defames Zaky, the Court cannot annul the blow or the libel. These are unalterable facts. All it can do is to declare the right of Zaky to have some kind of compensation, usually pecuniary, for the breach

(*k*) See Declaration of Legitimacy Act, 21 & 22 Vict. c. 93, s. 8.

(*l*) For antecedent and remedial rights see Chap. VIII.

of the right which has been perpetrated by Ahmed. In cases in which the infringement of the antecedent right caused an estimable pecuniary damage, and no more, the remedial right to pecuniary compensation is generally a satisfactory remedy. But in other cases it is only a partial satisfaction, justifiable rather because of the ease with which it is applied, but otherwise not wholly satisfactory.

However, a remedial right to receive pecuniary compensation is the remedy usually given by modern law for breach of right. Leaving apart the Criminal law, which makes use of remedies of a different character, a man whose right is infringed generally finds that the law does not, very often cannot, restore the state of things which existed before the right was infringed. All that it will (or, perhaps, can) do is to give him the right to receive a sum of money. If the original claim was only a claim to a sum of money, a money debt, the remedial right has the same content as the antecedent right, and both are, except from a theoretical point of view, the same right. If Ahmed owes Zaky £E10, and sues him for the money, he will get judgment for £E10, costs and interest. In such a case reinstatement is accomplished. When Ahmed has been paid the £E10 and costs and interest, he is practically (not perhaps entirely) in the same position as he would have been had Zaky fulfilled his antecedent duty by paying the money when it was due.

This state of things is very common, and when it occurs the law may be said to be successful in securing the exact fulfilment of the right infringed. Often, however, the alternative is presented to the law, either to give a remedial right to pecuniary compensation, or to compel the person who has infringed the antecedent right to do the very thing which he has left undone (other than payment of money), or otherwise to restore the state of things which existed before the breach.

Systems of law vary in their choice between these

alternatives. When the wrongdoer has infringed a right of ownership or possession by depriving the holder of the right of the enjoyment of the thing the judgment normally declares that the owner or possessor is entitled to be put back in his enjoyment of the right infringed. Such a judgment is *in rem* (*m*). But the right to recover movables *in specie* is far less extended than that to the recovery of immovables. Indeed, in French law the *revendication* of movables is very often barred by the rule *En fait des meubles possession vaut titre*.

The judgment declaring the right contemplates as we have seen an execution. The state authorities will forcibly intervene to compel the unsuccessful litigant to fulfil the right declared by the Courts.

When the judgment declares that the successful party is entitled to receive a sum of money or a specific thing, movable or immovable, it is physically possible to secure the payment or delivery. The bailiff can seize and sell the judgment debtor's goods, and out of the proceeds he can pay the debt to the judgment creditor. Or the wrongful possessor can be forcibly ejected from his possession and the rightful possessor reinstated in enjoyment of the land or goods.

But in other cases it is more difficult to execute a judgment. Sometimes, indeed, particularly in the case where the

(*m*) A judgment *in rem* (e.g., a judgment affecting status or determining property) is binding, not only between the parties to the suit, but in all suits and between all parties. "Such a judgment, when the jurisdiction of the Court which made it is recognized, is treated as binding and final, not only by the Courts of the same authority, but by the Courts of all countries. It is binding, as is usually said, against the world" (*per* BRETT, L.J., in *Niboyet v. Niboyet* (1878), 44 L. J. (P.) 1).

A judgment *in personam*, on the other hand, is binding only between the parties to the suit. As between them it constitutes the matter in dispute *res judicata* (*chose jugée*), but the declaration of rights in the judgment is authoritative only for the parties and only as to the matter in issue.

right infringed is a *jus ad rem*, the judgment may accomplish its own execution. Thus if Ahmed refuses to sign a document transferring a right to Zaky, the law might, and sometimes does, give to the Courts power to transfer the right by the effect of the judgment. Or the Court may seek to secure the accomplishment of an act by threatening the party with dire penalties if he fails to do the act. Thus, in England, the specific performance of some contracts can be obtained by obtaining an order of the Court directing the recalcitrant party to do the act, and in default of compliance attachment for contempt of court will follow, and the person failing to comply may be imprisoned. In a somewhat similar manner the English Court has power when a breach of right is contemplated, even though not accomplished, or when some act has been done which is an infringement of right, to issue an order known as an "Injunction" forbidding a person to do the act contemplated or requiring him to do what is necessary to remedy infringement, and failure to comply with the injunction constitutes a contempt of court. In French law these peculiar methods of procedure are unknown, but the Courts will in certain cases seek to secure the performance of an act by pronouncing minatory pecuniary damages against a person who does not do what the Court declares it to be his duty to do (n).

(n) As to Specific Performance see "Laws of England," XXVI., §§ 1 ff. As to Injunctions, "Laws of England," XVII., §§ 442 ff. For the French system of "*astreintes*" see Planiol, II., §§ 207 ff. The French Code of Civil Procedure, art. 1036, gives power to the Courts to pronounce "*injonctions*," but does not state what their effect is to be.





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